Supreme Court, U.S.
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In The

Supreme Court of the United States

TIMOTHY WALTON,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Tennessee

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether non-testimonial evidence discovered directly as a result of a custodial interrogation that violated the constitutionally-required Fifth Amendment protections set forth in *Miranda v. Arizona*, 384 U.S. 436 (1966), must be excluded from trial as fruit of the poisonous tree.

STATEMENT OF INTERESTED PARTIES

All parties to this case are named in the caption. No party to this petition is a non-governmental corporation requiring a statement as to publicly held ownership interests pursuant to Rule 29.6 of the Rules of this Court.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

Petitioner Timothy Walton respectfully petitions for a writ of certiorari to review the judgment of the Tennessee Supreme Court dated March 15, 2001. A majority of that court ruled that non-testimonial evidence discovered directly as a result of a custodial interrogation that violated the constitutionally-required Fifth Amendment protections set forth in *Miranda v. Arizona*, 384 U.S. 436 (1966), need not be suppressed as fruit of the poisonous tree.

OPINIONS AND ORDERS BELOW

The March 15, 2001 opinion and judgment of the Tennessee Supreme Court, affirming in part and reversing in part the decision of the Tennessee Court of Criminal Appeals, is reported as *State v. Walton*, 41 S.W.3d 75 (Tenn. 2001), and is reproduced in the Appendix, *infra*. App. 1-54. The decision of the Tennessee Court of Criminal Appeals is reported as *State v. Walton*, 1999 WL 236459 (Tenn. Crim. App. Apr. 23, 1999). The ruling of the Trial Court is not reported.

JURISDICTION

The opinion and judgment of the Tennessee Supreme Court was entered on March 15, 2001. Petitioner presented his federal constitutional issues at every stage of the proceedings in the Tennessee courts. *See infra* App. 6-9. This Court has jurisdiction to review the state court judgment by petition for writ of certiorari pursuant to 28 U.S.C. §§ 1257(a) and 2104. On May 10, 2001, Justice Stevens granted Petitioner an extension until July 13, 2001 to file his petition, which is being filed within 120

days of the March 15, 2001 judgment entered by the Tennessee Supreme Court.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

"No person . . . shall be compelled in any criminal case to be a witness against himself. . . . "

STATEMENT OF THE CASE

Petitioner Timothy Walton's Petition for Writ of Certiorari raises the question whether the government can interrogate a suspect in custody without reading the constitutionally-required *Miranda* warnings, use his unwarned statements to locate non-testimonial evidence and then introduce that evidence against him in its case-in-chief to prove guilt.

On May 22, 1997, two federal postal inspectors and three officers of the Dyer County Sheriff's Department went to the home of Petitioner Walton, who is illiterate, to discuss recent post office burglaries in Finley, Tennessee. (App. 2, 6). Upon arriving at Mr. Walton's trailer, both postal inspectors and two of the police officers approached Mr. Walton. (App. 3). The third officer, Officer Burns, subsequently went behind the trailer and noticed a path leading from the trailer into the woods. *Id.* After following the path, he discovered a small clearing containing about ten or fifteen marijuana plants and several propane heaters. *Id.*

Officer Burns returned to the trailer and notified the other officers and the postal inspectors of his discovery. *Id.* Thereafter, one of the officers and both postal inspectors went to inspect. *Id.* Mr. Walton, who denied ownership of the plants or the heaters, remained near the trailer

with Officer Johnson, "talking with him." *Id.* At some point while the other officers were photographing the scene and "recovering [the] evidence," Officer Johnson requested that Mr. Walton accompany the officers and the postal inspectors to the Sheriff's Department to discuss further the Finley post office burglaries. *Id.* Mr. Walton agreed to go, and although the officers informed him that he was not under arrest for the marijuana or for any other crime, Officer Johnson handcuffed him and placed him in the back of Officer McCreight's unmarked patrol car. *Id.*

At some point later, Mr. Walton mentioned the name of a Charles Thompson, who apparently had informed the police of Mr. Walton's role in the post office burglaries. (App. 4). Mr. Walton said "I know what lies and things that [Thompson has been] telling on me. And I've got some information where we can get him." *Id.* During the conversation, Mr. Walton claimed to know the location of several items that Thompson had stolen. *Id.* In response, Officer Johnson asked Mr. Walton whether he could show the property to the police officers, and Mr. Walton responded that he would. *Id.*

Once in the patrol car with Officers Johnson and McCreight, Mr. Walton gave the officers directions to a point along a public road where a piece of plastic had been tied to a barbed wire fence. *Id.* Mr. Walton told the officers to stop, and the officers allowed him, with his handcuffs still on, to exit the car and venture into a ravine. *Id.* Mr. Walton returned a few minutes later carrying a plastic garbage bag containing a computer, a monitor and a keyboard. *Id.* The officers, who later testified that they had no knowledge of a stolen computer before Mr. Walton brought it to them, placed the items in the trunk of the patrol car. *Id.*

At this point, Mr. Walton told the police officers that he knew where more property was located and he gave

the officers directions to his parents' house. (App. 5). Once they arrived at the house, Officer Johnson asked, "Which way do we go from here?" and Mr. Walton responded by asking him to follow. *Id.* Mr. Walton took the officers into a barn where, with his handcuffs still on, he started to remove some floorboards. *Id.* Officer Johnson asked Mr. Walton to stop for a moment, while Officer McCreight photographed the scene. *Id.* When Mr. Walton was permitted to resume, he uncovered a rifle wrapped in a pair of blue coveralls. *Id.* Mr. Walton handed the rifle to Officer Johnson, who recognized it as one reported stolen from a residence in Finley. *Id.* Knowing that the stolen rifle also had a scope, Officer Johnson then asked Mr. Walton whether "there was anything else to go with [the rifle]," to which Mr. Walton responded that the scope to the rifle was back at his house. *Id.*

The trio then returned to Mr. Walton's residence. *Id.* With the handcuffs still on, Mr. Walton directed the officers to his bedroom closet, from which he produced the rifle scope, several electric heaters and a step ladder, all items that the police later determined were stolen from the Dyersburg Warehouse. *Id.* The officers then proceeded to take Mr. Walton and all the property to the police station. *Id.*

Once at the police station, the officers informed Mr. Walton for the first time of his right to remain silent and of his right to have an attorney present. (App. 6). Despite the fact that Officer McCreight was aware that Mr. Walton was illiterate, he requested that Mr. Walton sign and date a form labeled "Admonition and Waiver," which contained a written statement of his *Miranda* rights and a waiver of those rights. *Id.* After signing the form, Mr. Walton gave a statement that detailed the dealings of Charles Thompson and another individual in obtaining the stolen property. *Id.* According to Officer Johnson,

though, Mr. Walton never stated that "he had anything to [do] with [this] at all." *Id.* (alteration in original).

On August 11, 1997, the Dyer County Grand Jury returned a four-count indictment against Mr. Walton, charging him with two counts of theft over five hundred dollars, one count of burglary, and one count of aggravated burglary, for the evidence he disclosed in response to Officer Johnson's express questioning. (App. 6, 19). Mr. Walton was not charged in regard to the marijuana plants or the propane heaters. Two months later, Mr. Walton filed a motion to suppress any statements and evidence resulting from the failure of the officers to inform him of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). (App. 6). At the hearing, the State argued that no *Miranda* warnings were needed because Mr. Walton was never placed in custody and he had spontaneously volunteered all the information to the police without first having been questioned. *Id.* Mr. Walton argued that the police "intimidated, urged, coaxed, coerced, questioned, and interrogated" him into revealing the location of the stolen property, and that his incriminating statements were neither voluntary nor spontaneous. (App. 6-7).

On January 5, 1998, the trial court denied Mr. Walton's motion to suppress, ruling that, while he was in custody, he was not subjected to interrogation. (App. 7). On February 6, 1998, Mr. Walton entered a conditional guilty plea to the burglary and aggravated burglary counts, reserving for appeal the trial court's denial of his motion to suppress. (App. 8). The trial court then sentenced Mr. Walton to three years imprisonment for the burglary conviction and to four years imprisonment for the aggravated burglary conviction, both sentences to be served concurrently. *Id.*

The Tennessee Court of Criminal Appeals reversed the trial court's decision. *Id.* Although the Court of Criminal Appeals agreed that Mr. Walton was placed in custody, it also found that his incriminating statements were not "spontaneously made," but instead resulted from the coercive nature of the arrest. *Id.* The Court of Criminal Appeals then suppressed all the evidence against Mr. Walton and dismissed the charges. *Id.*

On appeal, the Tennessee Supreme Court ruled that Mr. Walton was placed in custody and subjected to interrogation. (App. 8-20). The Supreme Court noted that Officer Johnson "had every reason to believe that the answers to his questions would lead to the recovery of stolen property, and from all indications in the record, this was precisely the officer's hope and expectation." (App. 19). As a result, all statements that Mr. Walton had made in response to the interrogation had to be suppressed under *Miranda*. (App. 8-9, 19-20).

However, the Tennessee Supreme Court further ruled, with one Justice dissenting, that the non-testimonial evidence discovered directly as a result of Mr. Walton's unwarned statements in violation of *Miranda* was admissible in the absence of any evidence that his statements were the product of "actual coercion." (App. 9, 20-43). The Supreme Court acknowledged that this Court had not settled the issue of whether non-testimonial evidence discovered directly as a result of a *Miranda* violation should be excluded as fruit of the poisonous tree. (App. 21, 29). Nonetheless, relying principally on *Oregon v. Elstad*, 470 U.S. 298 (1985), the Supreme Court ruled that non-testimonial fruits of a *Miranda* violation need not be suppressed because the *Miranda* warnings are mere "prophylactic" procedures which, if violated, do not transgress the Fifth Amendment itself.

(App. 23-26). Addressing this Court's decision in *Dickerson v. United States*, 530 U.S. 428 (2000), reaffirming that *Miranda* announced a constitutional rule based on the Fifth Amendment, the Tennessee Supreme Court stated: "We do not view *Dickerson* as now compelling a finding that a failure to administer *Miranda* warnings is itself a violation of the Fifth Amendment." (App. 29). On the basis of that assumption, the Tennessee Supreme Court concluded that non-testimonial evidence discovered directly as a result of a *Miranda* violation need be suppressed only if there is "actual coercion" of the statements from which non-testimonial evidence is derived. (App. 29, 33). Finding no such "actual coercion," the Supreme Court affirmed the suppression of Mr. Walton's statements but reversed the decision to exclude the non-testimonial evidence derived therefrom. (App. 38-42).

Justice Birch dissented, finding the majority's decision not to exclude the non-testimonial evidence a "gross incursion upon the letter and spirit of *Miranda* and tend[ing] to invite open defiance and disregard of the *Miranda* doctrine by those bound to respect it." (App. 44). Noting recent scholarly commentary on the police practice of "questioning outside *Miranda*," Justice Birch concluded that the police will not be deterred from violating a suspect's *Miranda* rights if non-testimonial fruits of those violations are allowed in evidence. (App. 48-51).

REASONS FOR GRANTING THE WRIT

There are two reasons to grant the petition for a writ of certiorari in this case. First, this Court has never addressed the fundamentally important question whether non-testimonial evidence discovered directly as a result of a custodial interrogation that violated the constitutionally-required Fifth Amendment protections set forth in *Miranda v. Arizona*, 384 U.S. 436 (1966), must be excluded as fruit of the poisonous tree. Suppression of non-testimonial fruits of a *Miranda* violation is necessary to deter the police from failing to read the warnings, is consistent with this Court's previous decisions applying the poisonous tree doctrine both to non-constitutional and statutory violations, and is supported by the historic understanding of the Fifth Amendment itself.

Second, this Court should grant the writ to correct the Tennessee Supreme Court's misinterpretation of *Oregon v. Elstad*, 470 U.S. 298 (1985), that non-testimonial evidence need not be suppressed because the *Miranda* warnings are mere "prophylactic" procedures which, if violated, do not transgress the Fifth Amendment itself. The Tennessee Supreme Court's ruling is inconsistent with this Court's recent decision in *Dickerson v. United States*, 530 U.S. 428 (2000), reaffirming that *Miranda* established a constitutional rule to safeguard the Fifth Amendment privilege against self-incrimination.

I. THE COURT SHOULD GRANT THE WRIT TO DECIDE WHETHER THE NON-TESTIMONIAL FRUITS OF A *MIRANDA* VIOLATION ARE ADMISSIBLE

Last Term, this Court ruled in *Dickerson v. United States*, 530 U.S. 428, 431, 437-38 (2000), that *Miranda v. Arizona*, 384 U.S. 436 (1966), was a "constitutional decision of this Court" and, as such, the protections announced in that decision were constitutionally required by the Fifth Amendment to the United States Constitution. In *Miranda*, the Court had concluded that "without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.* at 467. Hence, the Court formulated the now-familiar *Miranda* warnings "to secure the privilege against self-incrimination." *Id.* at 444. The Court's fundamental aim in constitutionally requiring those *Miranda* warnings was "to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process." *Id.* at 469.

Since *Miranda* was decided, this Court has never addressed the fundamentally important question whether non-testimonial evidence discovered directly as a result of an unwarned statement in violation of *Miranda's* Fifth Amendment protections must be excluded as "fruit of the poisonous tree." *Wong Sun v. United States*, 371 U.S. 471, 488 (1963); *Nardone v. United States*, 308 U.S. 338, 341 (1939).[1]

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[1] *See Patterson v. United States*, 485 U.S. 922, 922 (1988) (White, J., and Brennan, J., dissenting from denial of certiorari) (recognizing that the Court has left open the issue of whether non-testimonial fruits of a *Miranda* violation must be suppressed).

Shortly after *Miranda* was decided in 1966, the vast majority of federal and state courts excluded such evidence.[2] However, since this Court's 1985 decision in *Oregon v. Elstad*, 470 U.S. 298 (1985),[3] many federal courts and a few state courts have ruled that non-testimonial evidence is admissible on the mistaken assumption, now repudiated in *Dickerson*, that the *Miranda* warnings are not constitutionally required to protect the Fifth Amendment privilege.[4] *Dickerson*, 530 U.S. at 437-38 (disavowing language in *Elstad* and other cases that the protections announced in *Miranda* were not constitutionally required). However, this conclusion has not been unanimous, as several state courts have rightly concluded, particularly after *Dickerson*, that the traditional poisonous tree doctrine should apply to non-testimonial evidence

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[2] *See, e.g., United States v. Lee*, 699 F.2d 466, 468 (9th Cir. 1982); *United States v. Harrison*, 265 F. Supp. 660, 662 (S.D.N.Y. 1967); *Ex parte Yarber*, 375 So.2d 1231, 1234-35 (Ala. 1979); *People v. Vigil*, 489 P.2d 588, 590 (Colo. 1971) (en banc); *State v. Lekas*, 442 P.2d 11, 19-20 (Kan. 1968); *State v. Preston*, 411 A.2d 402, 406-09 (Me. 1980); *State v. Mitchell*, 155 S.E.2d 96, 99 (N.C. 1967).

[3] In *Elstad*, this Court ruled that a police officer's failure to read the *Miranda* warnings before a suspect's first confession did not require suppression of a second confession that was given after the suspect was fully advised of and waived his Fifth Amendment rights. *Elstad*, 470 U.S. at 318.

[4] *See, e.g., United States v. Elie*, 111 F.3d 1135, 1140-43 (4th Cir. 1997); *United States v. Gonzalez-Sandoval*, 894 F.2d 1043, 1047-49 (9th Cir. 1990); *United States v. Barte*, 868 F.2d 773, 774 (5th Cir. 1989), *cert. denied*, 493 U.S. 995 (1989); *United States v. Sangineto-Miranda*, 859 F.2d 1501, 1514-19 (6th Cir. 1988); *In re Owen F.*, 523 A.2d 627, 631-32 (Md. Ct. Spec. App. 1987), *cert. denied*, 528 A.2d 1286 (Md. 1987); *People v. Holmes*, 536 N.Y.S.2d 289, 291 (N.Y. App. Div. 1988), *appeal denied*, 547 N.E.2d 957 (N.Y. 1989); *State v. Wethered*, 755 P.2d 797, 800-02 (Wash. 1988).

obtained in violation of *Miranda's* Fifth Amendment protections.[5]

In this case, the Tennessee Supreme Court, although fully aware of this Court's recent decision in *Dickerson*, aligned itself with the majority of post-*Elstad* rulings refusing to apply the poisonous tree doctrine to *Miranda* violations. In stark contradistinction to this Court's ruling in *Dickerson*, the Tennessee Supreme Court refused to view "*Dickerson* as now compelling a finding that a failure to administer *Miranda* warnings is itself a violation of the Fifth Amendment." (App. 29). Proceeding on that now-discredited assumption, the Tennessee Supreme Court reached the further erroneous conclusion – as have several federal and state courts after *Elstad* – that non-testimonial evidence directly discovered as a result of a *Miranda* violation need not be suppressed under the poisonous tree doctrine. (App. 21-41).

Petitioner Walton respectfully requests that this Court grant the petition for writ of certiorari to resolve this fundamentally important question. Consistent with the recent decision in *Dickerson*, which reaffirmed the constitutional nature and importance of the *Miranda* warnings in safeguarding the Fifth Amendment privilege against self-incrimination, this Court should conclude that the Tennessee Supreme Court erred in refusing to suppress non-testimonial evidence directly discovered as

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[5] *See, e.g., People v. Breidenbach*, 875 P.2d 879, 889 (Colo. 1994) (en banc); *State v. C.F.*, No. 4D00-2513, 2001 WL 527682, slip op. at *3 (Fla. Dist. Ct. App., May 16, 2001); *State v. Linck*, 708 N.E.2d 60, 63-66 (Ind. Ct. App. 1999); *State v. Miller*, 709 P.2d 225, 241 (Or. 1985). In addition, at least one federal district court has questioned a circuit court's pre-*Dickerson* ruling. *See United States v. White*, No. CR. CCB-00-0383, 2001 WL 487765, slip op. at *4 n.5 (D. Md. May 8, 2001) (calling into doubt the Fourth Circuit's ruling in *Elie, supra* note 4, on the basis of *Dickerson*).

a result of a *Miranda* violation. In the absence of a recognized exception to the poisonous tree doctrine,[6] suppression of non-testimonial fruits in this situation is necessary to deter the police from failing to read the *Miranda* warnings, is consistent with this Court's previous decisions applying the poisonous tree doctrine to non-constitutional and statutory violations, and is supported by the historic meaning of the Fifth Amendment itself.

A. Suppression Of The Non-Testimonial Fruits Of A *Miranda* Violation Is Necessary To Deter The Police From Failing To Read The Warnings

For the past 60 years, this Court has prohibited the government from introducing the evidentiary "fruits" of illegally obtained evidence under the "fruit of the poisonous tree" doctrine. *Murray v. United States*, 487 U.S. 533, 536-37 (1988); *Wong Sun v. United States*, 371 U.S. 471, 488 (1963); *Nardone v. United States*, 308 U.S. 338, 341 (1939). The primary purpose of the poisonous tree doctrine is to deter the police from committing future misconduct by depriving them of the "fruits" of their misdeeds. *Nix v. Williams*, 467 U.S. 431, 442-43 (1984). The doctrine proceeds on the basic, valid assumption that the police will not be effectively deterred if they may use inadmissible evidence to gather other incriminating proof for use at trial. *Wong Sun*, 371 U.S. at 484-85; *Nardone*, 308 U.S. at 340-41. By suppressing derivative evidence, the

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[6] This Court has not required suppression of derivative evidence when the government can show that: 1) the evidence would have been discovered from a source independent of the illegality, *Murray v. United States*, 487 U.S. 533, 537-39 (1988); 2) the evidence inevitably would have been discovered by independent, lawful means, *Nix v. Williams*, 467 U.S. 431, 444 (1984); or 3) the connection between the illegal conduct and the acquisition of the evidence was so attenuated that the taint of the unlawful acts had dissipated, *United States v. Ceccolini*, 435 U.S. 268, 274-75 (1978); *Nardone*, 308 U.S. at 341.

poisonous tree doctrine places the government and the defendant in the same position as if the wrongdoing had not occurred and allows the prosecution to proceed on the basis of evidence secured independently of misconduct. *Nix*, 467 U.S. at 442-43.

On the other hand, if the government is permitted to introduce the non-testimonial fruits of a *Miranda* violation at trial, the police will be rewarded for their misconduct and thus have a significant incentive to ignore the warnings. When a police officer is faced with having to read the warnings to a suspect in custody, his choices will be twofold: 1) forego the warnings and the suspect's confession, but with the understanding that the confession can be used to discover admissible non-testimonial evidence; or 2) read the warnings and risk losing both the confession and the resultant non-testimonial evidence if the suspect exercises his right to remain silent. Given the potential benefits of the first option, the police will have a significant incentive to ignore the *Miranda* warnings.[7] The deterrent effect of suppressing the suspect's confession is significantly reduced by the opportunity to uncover

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[7] *United States v. Downing*, 665 F.2d 404, 409 n.5 (1st Cir. 1981) ("The possibility of obtaining admissible derivative evidence would seem to remove much of the incentive for police to follow the dictates of *Miranda*."); *State v. Gravel*, 601 A.2d 678, 685 (N.H. 1991) ("To allow the police the freedom to disregard the requirements of *Miranda* and thereby risk losing only the direct product of such action, but not the evidence derived from it, would not only not deter future *Miranda* violations but might well tend to encourage them.").

highly probative admissible evidence.[8] Professor Yale Kamisar has framed the issue succinctly:

> How could we possibly expect the police to comply with *Miranda* if the courts barred only the use of incriminating statements obtained in violation of that doctrine, but none of the leads or clues or evidence these statements brought to light?[9]

The answer is clear:

> If *Miranda* is to make any sense, if *Miranda* is to be taken seriously, if *Miranda* is to be afforded a real chance of deterring objectionable and impermissible police interrogation practices, then the stolen property and the murder weapon and other physical evidence obtained as a result of these inadmissible statements must be thrown out.[10]

Justice Birch in his dissent in this case iterated the same point: "It is difficult to deny that allowing the physical fruits of a *Miranda* violation to be used as evidence greatly encourages this questionable practice [of 'questioning outside *Miranda*']." (App. 51).[11] The Tennessee

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[8] The fear that the *Miranda* warnings will inhibit self-incriminating statements makes the first option even more attractive than the second. *See, e.g., Cooper v. Dupnik*, 963 F.2d 1220, 1224-25 (9th Cir. 1992) (en banc) (police officer testified that the suspect purposefully was not advised of his *Miranda* rights to ensure that he would not rely on his right to remain silent), *cert. denied*, 506 U.S. 953 (1992).

[9] Yale Kamisar, *Confessions, Search and Seizure and the Rehnquist Court*, 34 Tulsa L.J. 465, 479 (1999) [hereinafter *Confessions*].

[10] *A New Look At Confessions: Escobedo – The Second Round* 150 (B. James George, Jr. ed. 1967).

[11] *See, e.g., California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039, 1042-45 (9th Cir. 1999) (finding that police officers intentionally questioned suspects outside of *Miranda* in

Supreme Court's decision, perhaps unwittingly, acknowledged this as well when it noted that Officer Johnson "had every reason to believe that the answers to his questions would lead to the recovery of stolen property, and from all indications in the record, this was precisely the officer's hope and expectation." (App. 19).

There are many reported cases where the police have arrested suspects and interrogated them without the *Miranda* warnings in order to discover the existence or location of non-testimonial evidence.[12] For instance, training

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accordance with police training materials and ignored invocation of the right to silence and counsel); *People v. Peevy*, 17 Cal.4th 1184, 1189-90, 953 P.2d 1212, 1215, 73 Cal. Rptr.2d 865, 868 (Cal. 1998) (finding that police officer deliberately violated the dictates of *Miranda* when he ignored suspect's request for counsel), *cert. denied*, 525 U.S. 1042 (1998); Joshua Dressler & George C. Thomas, III, *Criminal Procedure: Principles, Policies and Perspectives* 605 (1999) (documenting police practice of questioning outside *Miranda*); Charles D. Weisselberg, *Saving Miranda*, 84 Cornell L. Rev. 109, 132-40 (1998) (same).

[12] *See, e.g., United States v. Carter*, 884 F.2d 368, 373 (8th Cir. 1989) (finding that police officers "persistently interrogated [suspect] for nearly an hour," failed to read *Miranda* warnings, induced him to reveal the contents of his wallet, and then confronted him with the information that it contained bait money); *Sangineto-Miranda*, 859 F.2d at 1515 (finding facts in which police officers arrested and handcuffed suspects, failed to read *Miranda* warnings, and interrogated one of them about means of transportation to place of arrest); *United States v. Rullo*, 748 F. Supp. 36, 39 (D. Mass. 1990) (finding that police officers punched and kicked suspect in custody, failed to read *Miranda* warnings, and repeatedly interrogated him about location of gun); *People v. Breidenbach*, 875 P.2d 879, 884, 889 (Colo. 1994) (en banc) (finding that police officer interrogated suspect without *Miranda* warnings to find location of marijuana plants); *Gravel*, 601 A.2d at 681 (finding that police officer interrogated suspect without *Miranda* warnings to find location of drugs); *State v. Wethered*, 755 P.2d 797, 798 (Wash. 1988) (finding that police officer arrested suspect, failed to read *Miranda* warnings, and

materials distributed to police departments throughout California instruct officers that, "[w]hen you violate *Miranda*, you're not violating the Constitution. . . . [When we question someone who has invoked his *Miranda* rights] [a]ll we lose is the statement taken in violation of *Miranda*. *We do not lose physical evidence that resulted from that.*"[13] This should not come as a surprise to those knowledgeable about police practices. Expert interrogators have long recognized, and continue to instruct, that a confession is a primary source for determining the existence and whereabouts of the fruits of a crime, such as documents or weapons.[14] "The process of interrogation ideally lends itself to the accomplishment of the recovery

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interrogated him about location of hashish); Richard Uviller, *Tempered Zeal, A Columbia Law Professor's Year On The Streets With The New York City Police* 205 (1988) (recounting several police officers' admissions that when they fail to read the *Miranda* warnings, they are seeking "confirmation of suspicion or leads to accomplices or weapons").

[13] Kamisar, *Confessions*, *supra* note 9, at 479 (quoting from police training videotape) (emphasis added); Weisselberg, *supra* note 11, at 134-35 (same).

[14] Charles E. O'Hara & Gregory L. O'Hara, *Fundamentals of Criminal Investigation* 135 (1994) (stating that purpose of interrogation is to "learn of the existence and locations of physical evidence such as documents or weapons"); Arthur S. Aubry, Jr. & Rudolph R. Caputo, *Criminal Interrogation* 27-28 (1980) (same); Wayne W. Bennett & Karen M. Hess, *Criminal Investigation* 189 (1998) (same); Art Buckwalter, *Interviews & Interrogations* 189 (1983) (same); *see also* Uviller, *supra* note 12, at 184 (1988) (recounting a sergeant's "heavy-handed interrogation [which] might well have been excessive, but [whose] only purpose seem[ed] to have been the recovery of the weapon").

of the fruits of the crime, particularly in the areas of stolen property, contraband, and money."[15]

Suppression of a suspect's unwarned statements alone will not provide sufficient deterrence of police misconduct. Police officers seeking physical evidence are not likely to view the loss of an unwarned confession as particularly great when weighed against the opportunity to recover highly probative non-testimonial evidence, such as a murder weapon or narcotics.[16] At trial, physical evidence is likely to have a greater impact on the ultimate determination of guilt or innocence than a confession. Confessions tend to be viewed with skepticism and even mistrust, particularly when they are recounted by police officers or subsequently challenged by the defendant.[17] On the other hand, non-testimonial evidence typically is "the most important element" in a case, establishing, for instance, the *corpus delicti*.[18] It is "mute proof of fact that hardly need[s] the same degree of corroboration as an

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[15] Aubry & Caputo, *supra* note 14, at 28. *See, e.g., Orozco v. Texas*, 394 U.S. 324, 325 (1969) (finding that police interrogated suspect to locate pistol).

[16] *Gravel*, 601 A.2d at 685 ("An officer more concerned with the physical fruits of an unlawfully obtained confession than with the confession itself might reasonably decide that the benefits of securing admissible derivative evidence outweighed the loss of the statements. *Miranda* would thus have lost a substantial amount of its value in protecting against compelled self-incrimination.").

[17] Uviller, *supra* note 12, at 185; O'Hara & O'Hara, *supra* note 14, at 162. A confession cannot be based solely on an uncorroborated confession of guilt; the confession requires extrinsic corroboration. *Wong Sun*, 371 U.S. at 488-89; *Smith v. United States*, 348 U.S. 147, 152-53 (1954); *Opper v. United States*, 348 U.S. 84, 89-91 (1954).

[18] Aubry & Caputo, *supra* note 14, at 28.

outright confession, let alone a statement subject to contradiction."[19] Such evidence particularly carries a great deal of weight at trial when it is introduced through the testimony of an expert witness. Indeed, many criminal prosecutions would fail without non-testimonial evidence.[20]

In fact, under *Elstad*, the police can "recover" the lost confession by reading the suspect the *Miranda* warnings and continuing the interrogation. *Elstad*, 470 U.S. at 318. By interrogating a suspect who has already incriminated himself once, the police are likely to secure a waiver and elicit the same confession as they had before, only this time the suspect's confession will be admissible at trial. *Id.* The probability that the suspect will confess a second time is even greater if the police confront the suspect with non-testimonial evidence.[21] Hence, there appears to be little reason for the police to read a suspect the *Miranda* warnings before initiating the interrogation when they will be rewarded by their failure to do so – by discovering non-testimonial evidence and, after a belated reading of the warnings, by eliciting an admissible confession.

That the poisonous tree doctrine should apply to a *Miranda* violation follows from this Court's reaffirmation in *Dickerson* that *Miranda* is a constitutional rule designed

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[19] Leonard L. Levy, *Constitutional Opinions: Aspects Of The Bill of Rights* 217 (1986).

[20] *Id.* ("The trustworthiness of physical evidence is such that without it a case may not be supported."); Bennett & Hess, *supra* note 14, at 190 (explaining that a confession "cannot legally stand alone," but "must be supported by physical evidence or other corroboration").

[21] *See, e.g., United States v. Carter*, 884 F.2d 368, 373 (8th Cir. 1989) (finding police officers persistently interrogated suspect for nearly an hour, failed to read *Miranda* warnings, induced him to reveal the contents of his wallet, and then confronted him with the information that it contained bait money).

to protect the Fifth Amendment privilege against self-incrimination. *Dickerson*, 530 U.S. at 437-38.[22] When a *Miranda* violation occurs, the accused has been interrogated in an inherently coercive setting without the assistance of counsel, without knowing that he or she may remain silent in the face of accusations, without appreciating that the interrogators must honor the right and stop all questioning, and without understanding that all statements, if volunteered, can be used against him or her. *Miranda*, 384 U.S. at 455-58, 467-71. Police interrogation, by its very character, subjects the accused to formidable pressure and isolation; "the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weaknesses of individuals." *Id.* at 455-56. The gravity of this misconduct begs for application of the poisonous tree doctrine to *Miranda* violations.

To be sure, the government has a legitimate interest in making probative evidence available at trial. However, this Court long ago struck the balance in favor of society's need to deter illegal police conduct. Ever since *Weeks v. United States*, 232 U.S. 383 (1914), the Court has accepted the notion that the only effective way to deter police misconduct is to exclude tainted evidence, even when the evidence is highly probative of guilt.[23] Over 30 years ago, Justice Frankfurter, writing for the Court in *Rogers v. Richmond*, 365 U.S. 534, 541 (1961), made this clear in a confession case, concluding that a coerced

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[22] *See also Orozco v. Texas*, 394 U.S. 324, 326 (1969) (ruling that use of admissions obtained in the absence of *Miranda* warnings "was a flat violation of the Self-Incrimination Clause of the Fifth Amendment as construed in *Miranda*.").

[23] *See Nix v. Williams*, 467 U.S. 431, 442-43 (1984) ("The core rationale consistently advanced by this Court for extending the exclusionary rule to evidence that is the fruit of unlawful police conduct has been that this admittedly drastic and socially costly course is needed to deter police from violations of constitutional and statutory protections.").

confession must be excluded at trial even though "independent corroborating evidence" left little doubt about its truth. The tainted evidence must be excluded essentially to teach the police an important and costly lesson: Failure to respect a suspect's rights will have adverse consequences and should not be repeated. As this Court has often noted, "[t]he prosecution must not be allowed to build its case against a criminal defendant with evidence acquired in contravention of constitutional guarantees and their corresponding judicially created protections." *Michigan v. Harvey*, 494 U.S. 344, 351 (1990). Just as the prosecution cannot argue that a coerced confession should be admissible on the ground that other evidence demonstrates its truthfulness,[24] the prosecution should be precluded from arguing that non-testimonial fruits of a *Miranda* violation are trustworthy and thus admissible at trial. In both situations, a compelling need exists to suppress the tainted evidence in order to instill in the offending officers and their future counterparts the importance of observing a suspect's rights.

Application of the poisonous tree doctrine to *Miranda* violations is not likely to handicap the investigation and prosecution of crime. The police have a variety of methods they can use to search for the fruits of a crime. For instance, they can question persons who are not in custody or otherwise deprived of their freedom in a significant way without reading the *Miranda* warnings, *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam), and they may dispense with the warnings when public safety concerns are involved. *New York v. Quarles*, 467 U.S. 649, 655-56 (1984). The police are allowed to use a suspect's volunteered statements as a means of discovering evidentiary fruits. *Michigan v. Tucker*, 417 U.S. 433, 450 (1974). Even when the police fail to read the *Miranda*

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[24] *Michigan v. Tucker*, 417 U.S. 433, 448 n.23 (1974); *Jackson v. Denno*, 378 U.S. 368, 384-85 (1964).

warnings to a person in custody, the prosecution can introduce derivative evidence if the evidence was in fact discovered independent of the misconduct, *Murray v. United States*, 487 U.S. 533, 537-39 (1988), or would have been inevitably discovered through lawful means already being pursued when the illegality occurred. *Nix*, 467 U.S. at 444. Derivative evidence will also be admissible if the connection between the illegal conduct and the acquisition of the evidence was so attenuated that the taint of the unlawful acts was dissipated. *Nardone*, 308 U.S. at 341.

If the poisonous tree does not apply to the direct fruits of a *Miranda* violation, police officers will come away with the wrong message: It is better to interrogate a suspect without the *Miranda* warnings than to use legitimate means to investigate crime. Permitting such interrogation would send an ominous signal to the police and prosecutors that citizens may be "exploited for the information necessary to condemn them before the law." *Culombe v. Connecticut*, 367 U.S. 568, 581 (1961) (Frankfurter, J., announcing the judgment of the Court). On the other hand, the police would be significantly deterred from committing *Miranda* violations if the poisonous tree doctrine were applicable to non-testimonial fruits. They would know that their failure to read the *Miranda* warnings results in the suppression of both the suspect's confession and any non-testimonial evidence that is discovered. The police would thus have every incentive to comply with *Miranda*.

B. Suppression Of The Non-Testimonial Fruits Of A *Miranda* Violation Is Consistent With This Court's Previous Decisions Applying The Poisonous Tree Doctrine Both To Non-Constitutional And Statutory Violations

Suppression of the non-testimonial fruits of a *Miranda* violation is consistent with this Court's historic refusal to allow the police to profit from their own illegal

conduct. This Court has, in fact, applied the poisonous tree doctrine not just to violations of constitutional rules – of which *Miranda* is one – but to *non*-constitutional violations as well.

The Court applied the poisonous tree doctrine to a *non*-constitutional violation in the seminal case on the doctrine itself, *Nardone v. United States*, 308 U.S. 338 (1939). In that case, the Court ruled that the government's violation of the federal wiretapping statute implicated the poisonous tree doctrine. *Id.* at 340-41. As a result, the government was precluded from using illegal wiretap messages not only as direct proof of guilt, but also as a basis to build a case against the defendant on retrial. *Id.* at 341. Permitting the accused "to examine the prosecution as to the uses to which it had put the information," *id.* at 339, the Court held that "[t]o forbid the direct use of [illegally obtained evidence] . . . but to put no curb on their full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty.' " *Id.* at 340.

The Court again applied the poisonous tree doctrine to a *non*-constitutional violation in *Harrison v. United States*, 392 U.S. 219 (1968). The Court ruled that when the prosecution introduces a defendant's confession at trial in violation of *Mallory v. United States*, 354 U.S. 449 (1957), and the defendant is compelled to testify in rebuttal, the testimony is the fruit of the inadmissible confession and cannot be used on retrial. *Harrison*, 392 U.S. at 222. The *Mallory* exclusionary rule, which required suppression of a confession obtained during an unnecessary delay in bringing a suspect before a judicial officer after arrest, was based on Federal Rule of Criminal Procedure 5(a) and the Court's supervisory powers over the administration of criminal justice in federal courts. Thus, *Harrison*, like *Nardone*, establishes that the rationale of the poisonous tree doctrine applies to police misconduct that

does not even rise to the level of a constitutional violation.

Given that the doctrine applies to non-constitutional violations, it must also apply to constitutional ones, such as *Miranda's* constitutional rule. The objective of the poisonous tree doctrine – effective deterrence of police misconduct – is equally, if not more, applicable when the offending conduct rises to the level of a constitutional violation as when it does not. In both situations, the offending officers and their counterparts will be effectively deterred from committing future violations only if derivative evidence is suppressed. Thus, the suppression of the non-testimonial fruits of a violation of *Miranda's* constitutional rule is consistent with *Nardone* and *Harrison* and warranted by the need to uphold the policies underlying *Miranda* itself.

C. Suppression Of The Non-Testimonial Fruits Of A *Miranda* Violation Is Consistent With The Historic Understanding Of The Fifth Amendment

Application of the poisonous tree doctrine to *Miranda* violations is supported by the historic understanding of the Fifth Amendment privilege against self-incrimination. The Fifth Amendment, which "operates to allow a citizen to remain silent when asked a question requiring an incriminating answer," has long been construed as prohibiting the government from using compelled statements *and any information derived therefrom* to prove a defendant's guilt in a criminal trial. *Kastigar v. United States*, 406 U.S. 441, 445, 453, 461 (1972). The Amendment bars "the use of compelled testimony, as well as evidence derived directly and indirectly therefrom," and "prohibits the prosecutorial authorities from using the compelled testimony in *any* respect." *Id.* at 453 (emphasis in original).

As long ago as 1892, this Court in *Counselman v. Hitchcock*, 142 U.S. 547, 585 (1892), construed the Fifth Amendment as excluding both compelled statements *and their fruits*. The Court stated that, if a coerced statement leads to "sources of information which may supply other means of convicting" the accused, those sources must be suppressed. *Id.* at 586. Under this constitutional exclusionary rule, the government is prohibited from making any use of compelled testimony and its fruits in connection with a criminal prosecution against the accused. *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79 (1964). Back then, the motivation behind this derivative evidence rule was not to deter future police misconduct but to "maintain intact the practical protection against incrimination that the Court conceive[d] the privilege to provide." B. James George, Jr., *The Fruits of Miranda: Scope of the Exclusionary Rule*, 39 U. Colo. L. Rev. 478, 481 (1967). In later years, and just prior to *Miranda*, the Court continued to rule that the Fifth Amendment privilege prohibited the government from using compelled statements and their fruits as evidence of guilt. *Murphy*, 378 U.S. at 79. Thus, when this Court issued its *Miranda* decision, it was against the backdrop that the Fifth Amendment itself prohibited the government from using coerced confessions and any information derived therefrom in its case-in-chief to prove an accused's guilt. The *Miranda* Court explicitly recognized this point when it stated that "our holding is not an innovation in our jurisprudence, but is an application of principles long recognized and applied in other settings." *Miranda*, 384 U.S. at 442. And even after *Miranda*, the Court continued to view the Fifth Amendment privilege against self-incrimination as prohibiting the use of compelled statements *and their fruits*. *See, e.g., Nix v. Williams*, 467 U.S. 431, 442 n.3 (1984); *Maness v. Meyers*, 419 U.S. 449, 461 (1975); *Lefkowitz v. Turley*, 414 U.S. 70, 78 (1973); *Kastigar*, 406 U.S. at 453.

Since the Fifth Amendment requires suppression of a coerced confession and its fruits, it follows that violation of *Miranda* – a constitutional rule designed to protect the Fifth Amendment privilege against self-incrimination – should have the same consequences. Under *Miranda*, custodial interrogation without the constitutionally-required Fifth Amendment warnings results in a coerced confession and violates the Fifth Amendment, thereby requiring the exclusion of non-testimonial evidence proximately derived therefrom.

II. THE COURT SHOULD GRANT THE WRIT TO CORRECT LOWER COURTS' MISINTERPRETATION OF *OREGON V. ELSTAD*

A. The Tennessee Supreme Court And Lower Courts Have Misread *Elstad*

In this case, the Tennessee Supreme Court relied principally on this Court's ruling in *Oregon v. Elstad*, 470 U.S. 298 (1985), in concluding that non-testimonial fruits of a *Miranda* violation need not be suppressed as fruit of the poisonous tree. Specifically, in reliance on *Elstad*, the Tennessee Supreme Court characterized the *Miranda* warnings as mere "prophylactic" procedures, the violation of which would not constitute "a violation of the Fifth Amendment itself." (App. 24, 26). The Tennessee Supreme Court stated: "We do not view *Dickerson* as now compelling a finding that a failure to administer *Miranda* warnings is itself a violation of the Fifth Amendment." (App. 29). On the basis of that faulty assumption, the Tennessee Supreme Court concluded that non-testimonial evidence discovered directly as a result of a *Miranda* violation need not be suppressed under the poisonous tree doctrine since no constitutional violation had occurred. (App. 28-29).

The Tennessee Supreme Court's analysis of *Elstad* is reminiscent of the reasoning of the United States Court of Appeals for the Fourth Circuit in *Dickerson* that this Court

rejected. This Court in *Dickerson* clarified that the language in *Elstad* and other cases purporting to characterize the *Miranda* warnings as "prophylactic" and "not themselves rights protected by the Constitution" was erroneous. *Dickerson*, 530 U.S. at 437-38. Rather, the Court held that *Miranda* "is a constitutional decision," and that statements obtained in violation of *Miranda's* safeguards violated constitutional standards for protection of the Fifth Amendment privilege against self-incrimination. *Id.* at 438-40.

The Tennessee Supreme Court's errors echo those of other lower courts that similarly misinterpreted this Court's decision in *Elstad*. As noted above, several federal and state courts have erroneously construed *Elstad* to mean that the *Miranda* warnings are not constitutional requirements, and have therefore held that *Elstad* permits non-testimonial evidence obtained from an interrogation in violation of *Miranda* to be admitted at trial.

This Court's decision in *Elstad* does not support the holdings of the Tennessee Supreme Court and other lower courts. In *Elstad*, the Court held that failure to read the *Miranda* warnings before a suspect's first confession did not require suppression of a second confession that the suspect voluntarily gave after being provided the full *Miranda* warnings and waiving the protections. *Elstad*, 470 U.S. at 300, 318. Noting that live testimony "is not to be mechanically equated with the proffer of inanimate evidentiary objects illegally seized," the Court held "that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings." *Id.* at 308-09, 318. In that case, the warnings conveyed to the suspect the substance of his constitutional rights and enabled him to "exercise his own volition" in deciding whether to make a second statement to the police. *Id.* at 308-09, 314-15. The warnings were sufficient "to remove the [coercive] conditions

that precluded admission of the earlier statement" and enabled the suspect to make a rational and informed choice whether to waive or invoke his rights. *Id.* at 314.[25] Indeed, in *Elstad*, there was no evidence that the defendant's second confession was motivated by the first statement. Thus, the holding in *Elstad* can be simply stated: A confession obtained after an administration and intelligent waiver of *Miranda* warnings will not be automatically suppressed if it was preceded by a confession obtained in violation of *Miranda*.

In this case, by contrast, Petitioner Walton was never read his *Miranda* warnings and could not make a rational and intelligent decision to waive those constitutionally-required protections, and thus the non-testimonial evidence was discovered directly as a result of his unwarned statements in violation of *Miranda*. The holding in *Elstad* does not apply to this type of case because the *sine qua non* of *Elstad* – administration and intelligent waiver of *Miranda* rights – never occurred.

As the ruling of the Tennessee Supreme Court and several lower courts are based on an erroneous interpretation of *Elstad* that stripped *Miranda* of its constitutional underpinnings, those decisions can no longer be supported on their asserted basis. Only this Court can halt this string of errors by directing the Tennessee Supreme Court and lower federal and state courts to heed the ruling in *Dickerson*, treat the *Miranda* warnings as constitutional requirements and require suppression of non-testimonial fruits of a *Miranda* violation.

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[25] *See State v. Gravel*, 601 A.2d 678, 685 (N.H. 1991) (observing that in *Elstad*, "deterrence of police misconduct by ascribing taint to and excluding the later confession would have been difficult to justify when the derivative second confession was a product of the defendant's own free will.").

B. The Tennessee Supreme Court's Two-Tier Approach Should Be Rejected

The analytical framework that the Tennessee Supreme Court and several lower federal and state courts have adopted after the *Elstad* decision for assessing whether non-testimonial fruits of a *Miranda* violation are admissible should be rejected. The Tennessee Supreme Court held that the trial court first must determine if a *Miranda* violation has occurred, and, if so, then assess whether, based on the totality of the circumstances, there has been an "actual" violation of the Fifth Amendment privilege against self-incrimination because the confession was involuntary. (App. 33, 41). Only upon a finding of "actual" coercion will non-testimonial fruits be deemed inadmissible. *Id.*

This two-tier approach introduces the shortcomings of the old due process "voluntariness" test that existed before *Miranda* into the derivative evidence analysis. Instead of implementing the poisonous tree doctrine in a practical and straightforward manner, trial courts instead must "mak[e] difficult determinations of voluntariness." *Minnick v. Mississippi*, 498 U.S. 146, 149 (1990). "[E]xperience suggests that the totality-of-the-circumstances test . . . is more difficult than *Miranda* for law enforcement officers to conform to and for courts to apply in a consistent manner." *Dickerson*, 530 U.S. at 444 (and cases cited therein). As this Court noted in *Dickerson*, the totality-of-the-circumstances test creates a risk of overlooking an involuntary custodial confession, a risk that the Court found unacceptably great when a confession is offered into evidence to prove guilt. *Dickerson*, 530 U.S. at 442. Thus, by using this test, there will be circumstances where non-testimonial evidence will be admitted

at trial even when there has been an involuntary custodial confession. As Justice Birch of the Tennessee Supreme Court noted in his dissent,

> If it were practicable for reviewing courts to determine through a simple totality-of-the-circumstances analysis whether statements made during custodial interrogation were coerced, there would be no need for *Miranda*. Under the majority's analysis, the risk that physical evidence will be admitted erroneously when, in actuality, that evidence has been obtained through unconstitutional coercion, is too great.

(App. 49).

Unlike the two-tier approach, the poisonous tree doctrine has the virtue of being easily understood and applied. Police officers who ignore the *Miranda* warnings will know that both the confession and the non-testimonial fruits will be suppressed. Trial courts faced with *Miranda* violations will know that exclusion of the tainted derivative evidence is required. No additional fact finding will be necessary.

CONCLUSION

Petitioner Timothy Walton respectfully requests that the Court issue the writ of certiorari because non-testimonial evidence discovered directly from statements in violation of the Fifth Amendment rule announced in *Miranda* should be suppressed as fruit of the poisonous tree. This conclusion will ensure that the police have every incentive to obey the law while enforcing it. For "in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." *Spano v. New York*, 360 U.S. 315, 320-21 (1959).

Respectfully submitted,

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IN THE SUPREME COURT OF TENNESSEE
AT JACKSON
November 16, 2000 Session

STATE OF TENNESSEE v. TIMOTHY WALTON

Appeal by Permission from the Court of Criminal Appeals
Cricuit Court for Dyer County
No. C97-205 Hon. R. Lee Moore, Jr., Judge

No. W1998-00329-SC-R11-CD

(Filed Mar. 15, 2001)

The primary issue in this case is whether the appellee was subjected to custodial interrogation in violation of the requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966), when officers questioned him in response to his volunteered, but unwarned, statements. The Dyer County Circuit Court found that although the appellee was placed in custody, his statements to the police as to the location of stolen property were spontaneous, voluntary, and not the result of interrogation. The appellee then entered a conditional guilty plea, reserving for appeal the question of whether he was subjected to custodial interrogation. The Court of Criminal Appeals reversed, finding that the greater weight of the evidence established that the appellee's statements were a result of interrogation, and it suppressed the appellee's statements and the physical evidence derived from his statements. The State then requested permission to appeal to this Court on the issue of whether the appellee was subjected to custodial interrogation in violation of *Miranda*. We agree with the

intermediate court that the appellee was placed in custody and subjected to interrogation, but we decline to suppress the physical evidence recovered by the officers absent any evidence that his statements were the product of actual coercion. Because the appellee's plea was made with the expectation that his statements were admissible as evidence, we remand this case to the Dyer County Circuit Court to give the appellee the opportunity to withdraw his plea should he so desire.

Tenn. R. App. P. 11 Application for Permission to Appeal; Judgment of the Court of Criminal Appeals Affirmed in Part, Reversed in Part; Case Remanded

WILLIAM M. BARKER, J., delivered the opinion of the court, in which E. RILEY ANDERSON, C.J., and FRANK F. DROWOTA, III, and JANICE M. HOLDER, JJ., joined. ADOLPHO A. BIRCH, JR., J., filed a concurring/dissenting opinion.

Paul G. Summers, Attorney General and Reporter; Michael E. Moore, Solicitor General; and Mark E. Davidson, Assistant Attorney General, Nashville, Tennessee, for the appellant, State of Tennessee.

Charles S. Kelly, Dyersburg, Tennessee, for the appellee, Timothy Walter.

OPINION

FACTUAL BACKGROUND

On May 22, 1997, two federal postal inspectors and three officers with the Dyer County Sheriff's Department went to the home of the appellee, Timothy Walton, to discuss recent post-office burglaries in Finley, Tennessee.

The inspectors apparently believed the appellee either participated in the burglaries or otherwise possessed relevant information. Upon arriving at the appellee's residence in three separate police cars, both postal inspectors and two of the officers approached the appellee, who was on his porch. The third officer, Officer Burns, then went behind the trailer, ostensibly to "secure the rear of the house for the officer's safety." While in the back yard, Burns noticed a path leading from the trailer into the woods, and following it, he discovered a small clearing containing about ten or fifteen marijuana plants. Burns also discovered several propane heaters located not far from the appellee's property.

Officer Burns returned to the trailer and notified the other officers and the postal inspectors of his discovery, and one of the officers and both postal inspectors went to inspect the plants and heaters. The appellee, who denied ownership of the plants or heaters, remained near the trailer with Officer Johnson, "talking with him." At some point while the other officers were photographing the scene and "recovering [the] evidence," Johnson requested that the appellee accompany the officers and the postal inspectors to the sheriff's department to further discuss the Finley post-office burglaries. The appellee agreed to go, and although the officers informed him that he was not under arrest for the marijuana or for any other crime, Johnson handcuffed the appellee and placed him in the back of Officer McCreight's unmarked patrol car. Apparently, the purpose of handcuffing the appellee was for the officers' security, as the patrol car was not equipped with a security cage.

Although the record is unclear as to precisely when the statements were made, at some point the appellee mentioned the name of a Charles Thompson, who apparently informed the police of the appellee's role in the post-office burglaries, and said "I know what lies and things that [Thompson has been] telling on me. And I've got some information where we can get him."[1] About the time that the parties prepared to go back to the sheriff's department, the appellee claimed to know the location of several stolen items that Thompson had given him "from some other places." Upon hearing this, Johnson then asked the appellee whether he could show the property to the officers, and the appellee responded, "Yes, I'll take you to it right now."

Once in the patrol car with Officers Johnson and McCreight, the appellee gave the officers directions to a point along a public road where a piece of plastic had been tied to a barbed wire fence. The appellee told the officers to stop, and the officers allowed him, with his handcuffs still on, to get out of the car and venture about thirty feet down into a ravine. The appellee returned a few minutes later carrying a plastic garbage bag containing a computer, a monitor, and a keyboard. The officers, who later testified that they had no knowledge of a stolen computer before the appellee brought it to them, placed the items in the trunk of the patrol car.

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[1] According to the testimony at the suppression hearing, none of the officers ever told the appellee that Thompson informed the police of the appellee's role in the burglaries. The State, in its brief before this Court, twice concedes that Thompson was the unidentified police informant.

At this point, the appellee then told the officers that he knew where more property was located, and he gave the officers directions to his parents' house. Once they arrived at the house, Johnson asked, "Which way do we go from here?" The appellee responded, "Just follow me," and he took the officers into a barn where, with his handcuffs still on, he started to remove some floorboards. Johnson asked him to stop for a moment while McCreight took some pictures of the scene. When the appellee was permitted to resume, he uncovered a rifle wrapped in a pair of blue coveralls. After first holding the wrapped rifle in the air so that McCreight could take another picture, the appellee handed the rifle to Officer Johnson, who recognized it as one reported stolen from a residence in Finley. Knowing that the stolen rifle also had a scope, Johnson then asked the appellee whether "there was anything else to go with [the rifle]," to which the appellee responded that the scope to the rifle was back at his house.

The trio then returned to the appellee's residence, and the appellee invited the officers into his house and back to his bedroom. With the handcuffs still on, the appellee went to his bedroom closet, from which he produced the rifle scope for the officers. Apparently without any other prodding, he also produced from the closet several electric heaters and a step ladder, all items that the police later determined were stolen from the Dyersburg Warehouse. The officers then proceeded to take the appellee and all of the property back to the police station. As they were leaving, Officer Johnson told the appellee's wife that the appellee was not under arrest.

Once at the police station, the officers informed the appellee for the first time of his right to remain silent and of his right to have an attorney present. Despite the fact that Officer McCreight was aware that the appellee was illiterate, McCreight also requested that the appellee sign and date a form labeled "Admonition and Waiver," which contained a written statement of his *Miranda* rights and a waiver of those rights. After signing the form, the appellee gave a statement that detailed the dealings of Charles Thompson and another individual, Billy McNeely, in obtaining the stolen property. According to Officer Johnson, though, the appellee never stated that "he had anything to with [this] at all."

On August 11, 1997, the Dyer County Grand Jury returned a four-count indictment against the appellee, charging him with two counts of theft over five hundred dollars, one count of burglary, and one count of aggravated burglary. Two months later, the appellee filed a motion to suppress any statements and evidence resulting from the failure of the officers to inform the appellee of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). A hearing on the motion was held on December 18, 1997, during which the State introduced the testimony of Officers Burns, McCreight, and Johnson. The State argued that no *Miranda* warnings were needed in this case because the appellee was never placed in actual custody and because the appellee had spontaneously volunteered all of the information to the police without first having been questioned. Although the appellee introduced no proof himself, he argued that the police "intimidated, urged, coaxed, coerced, questioned, and interrogated" him into revealing the location of other stolen property,

and that notwithstanding the officers' testimony, it was "inconceivable that the officers . . . did not ask any questions whatsoever." His counsel maintained that his incriminating statements were neither voluntary nor spontaneous.

On January 5, 1998, the trial court issued a "Memorandum Opinion and Order on Motion of Defendant to Suppress," denying the appellee's motion. The court disagreed with the State that the appellee was not placed in custody, because "[v]iewing this matter under the totality of the circumstances, . . . a reasonable person in the suspect's position would have considered himself deprived of freedom of movement to a degree associated with a formal arrest." However, the court found no evidence that the appellee was ever subjected to interrogation while he was in custody. As the court stated in its Memorandum Opinion,

> [t]he only testimony available to the court for consideration is the testimony of the three officers mentioned above. . . . Officer McCreight and Investigator Johnson testified that there was no interrogation and that all of the information given by the defendant was spontaneous and voluntary and not elicited as a result of any interrogation or suggestion by either officer. Consequently, although the . . . defendant was in custody at the time the information was obtained, . . . the information was given voluntarily by the defendant and not in response to interrogation by either officer. The need for formal *Miranda* warnings presumes that the statements are elicited through interrogation or questioning.

On February 6, 1998, the appellee entered a conditional guilty plea to the burglary and aggravated burglary counts of the indictments, reserving for appeal a certified question of law regarding the court's denial of his motion to suppress. The trial court then sentenced the appellee to three years imprisonment for the burglary conviction and to four years imprisonment for the aggravated burglary conviction, both sentences to be served concurrently in the Department of Correction.

The Court of Criminal Appeals reversed the decision of the trial court. Although the intermediate court agreed that the appellee was placed in custody, it also found that "[t]he greater weight of the evidence does not support the conclusions made by the trial court that the statements were admissible because they were spontaneously made." The court stated that "[w]hile the statements may have been voluntary, [they] were not made by the defendant with the full knowledge of his rights," and that "the 'coercive nature' of the arrest produced the incriminating information." The Court of Criminal Appeals then suppressed all of the evidence against the appellee and dismissed the charges.

The State then filed an application for permission to appeal before this Court on the sole issue of whether, as a matter of law, the appellee was subjected to interrogation within the meaning of *Miranda v. Arizona*. We granted the State's application,[2] and we agree with the Court of

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[2] Oral argument was heard in this case on November 16, 2000 in Jackson, Madison County, Tennessee, as part of this Court's S.C.A.L.E.S. (Supreme Court Advancing Legal Education for Students) project.

Criminal Appeals that the appellee was placed in custody and subjected to interrogation. We also find, however, that while any statements made by the appellee in response to interrogation are automatically suppressed, the physical evidence recovered by the officers is properly admissible absent any evidence that the appellee's statements were the product of actual coercion.

STANDARD OF APPELLATE REVIEW

This case involves a review of the trial court's findings of fact and conclusions of law in denying a motion to suppress evidence. Because issues of whether a defendant was placed in custody, interrogated, or voluntarily gave a confession are primarily issues of fact, *see State v. Morris*, 24 S.W.3d 788, 805 (Tenn. 2000); *State v. Anderson*, 937 S.W.2d 851, 855 (Tenn. 1996); *Childs v. State*, 584 S.W.2d 783, 786-87 (Tenn. 1979), we review these factual determinations by the trial court according to the standard set forth in *State v. Odom*, 928 S.W.2d 18 (Tenn. 1996). Under this standard, "a trial court's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise." *Odom*, 928 S.W.2d at 23.[3] Questions

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[3] We note that some cases from the intermediate court still refer to the standard in place prior to *Odom* for reviewing a trial court's findings of fact at a suppression hearing. *See, e.g., State v. Green*, 995 S.W.2d 591, 599 (Tenn. Crim. App. 1998) ("The findings of fact of the trial court on issues concerning the making of a custodial statement are binding upon appellate review if there is any evidence in the record to support them."). To be clear, the standard of appellate review for findings of fact at a suppression hearing is that articulated by this Court in *Odom*.

about witness credibility and "resolution of conflicts in the evidence are matters entrusted to the trial judge," *id.*, and the "[t]estimony presented at trial may be considered by an appellate court in deciding the propriety of the trial court's ruling on a motion to suppress." *State v. Perry*, 13 S.W.3d 724, 737 (Tenn. Crim. App. 1999). Our review of a trial court's application of law to the facts, however, is conducted under a *de novo* standard of review. *See State v. Crutcher*, 989 S.W.2d 295, 299 (Tenn. 1999); *State v. Yeargan*, 958 S.W.2d 626, 629 (Tenn. 1997).

CUSTODIAL INTERROGATION

The issues in this case involve the constitutional protection against compelled self-incrimination, which "is protected by both the federal and state constitutions." *State v. Blackstock*, 19 S.W.3d 200, 207 (Tenn. 2000). The Self-Incrimination Clause of the Fifth Amendment to the United States Constitution, made applicable to the states by *Mallory v. Hogan*, 378 U.S. 1, 6 (1964), provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." Our state constitution likewise contains a related provision in Article I, section 9, which guarantees that "in all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself." Although "we have traditionally interpreted article I, [section] 9 to be no broader than the Fifth Amendment," *State v. Martin*, 950 S.W.2d 20, 23 (Tenn. 1997), one "significant difference between these two provisions is that the test of voluntariness for confessions under Article I, [section] 9 is broader and more protective of individual rights than the test of voluntariness under the Fifth Amendment," *State v. Crump*, 834 S.W.2d 265,

268 (Tenn. 1992) (citing *State v. Smith*, 834 S.W.2d 915 (Tenn. 1992)).

To help insure the protections of the Fifth Amendment in the criminal process, the United States Supreme Court held in *Miranda v. Arizona*, 384 U.S. 436, 444 (1966), that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." As part of these safeguards, the police are required to inform persons being questioned while in custody of the following rights: (1) that they have the right to remain silent; (2) that any statement made may be used as evidence against them; (3) that they have the right to the presence of an attorney during questioning; and (4) that if they cannot afford an attorney, one will be appointed for them prior to questioning, if so desired. *See id.* at 444; *see also State v. Bush*, 942 S.W.2d 489, 499 (Tenn. 1997). As the Supreme Court recently re-emphasized, "*Miranda* and its progeny . . . govern the admissibility of statements made during custodial interrogation in both state and federal courts." *Dickerson v. United States*, 530 U.S. 428, ___ (2000).

The requirements of *Miranda* "must be strictly enforced, but only in those situations in which the concerns that motivated the decision are implicated." *State v. Goss*, 995 S.W.2d 617, 629 (Tenn. Crim. App. 1998) (citing *Illinois v. Perkins*, 496 U.S. 294, 296 (1990)). Of course, *Miranda* warnings are not required under every circumstance in which police officers come into contact with citizens. Rather, because "[t]he underpinnings of *Miranda* are to dissipate the compulsion inherent in custodial

interrogations, to prevent coerced self-incrimination, and to prevent relevant defendant ignorance," *see State v. Callahan*, 979 S.W.2d 577, 582 (Tenn. 1998), the requirements of *Miranda* come into play only when the defendant is in custody and is subjected to questioning or its functional equivalent, *see Rhode Island v. Innis*, 446 U.S. 291 (1980). Absent either one of these prerequisites, the requirements of *Miranda* are not implicated.

With regard to the issue of custody, the *Miranda* Court defined this requirement as when the defendant is placed under formal arrest or is "otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444; *see also Stansbury v. California*, 511 U.S. 318, 322 (1994) ("[T]he ultimate inquiry is simply whether there [was] a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest."). This Court has expanded this definition to mean "under the totality of the circumstances, [whether] a reasonable person in the suspect's position would consider himself or herself deprived of freedom of movement to a degree associated with a formal arrest." *State v. Anderson*, 937 S.W.2d 851, 855 (Tenn. 1996). To aid in determining whether a reasonable person would consider himself or herself in custody, this Court considers a variety of factors, including the following:

> the time and location of the interrogation; the duration and character of the questioning; the officer's tone of voice and general demeanor; the suspect's method of transportation to the place of questioning; the number of police officers present; any limitation on movement or other form of restraint imposed on the suspect during the interrogation; any interactions

> between the officer and the suspect, including the words spoken by the officer to the suspect, and the suspect's verbal or nonverbal responses; the extent to which the suspect is confronted with the law enforcement officer's suspicions of guilt or evidence of guilt; and finally, the extent to which the suspect is made aware that he or she is free to refrain from answering questions or to end the interview at will.

Anderson, 937 S.W.2d at 855.

In this case, the State concedes, and we agree, that the lower courts were correct in finding that the appellee was "in custody" for *Miranda* purposes. We first note that the appellee was confined in the backseat of a patrol car with two other officers present. *Cf. State v. Preston*, 411 A.2d 402, 405 (Me. 1980) (finding custody when defendant was questioned alone in an unmarked police car by two other officers). Second, we note that while the appellee voluntarily agreed to go to the police station with the officers, the officers nevertheless handcuffed the appellee before he got into the car, and he remained handcuffed during the entire afternoon as the officers drove around the county. Although one of the officers testified that the handcuffs were used only for security purposes while the appellee was in the patrol car, this conclusion is not credible given that the handcuffs were not removed even when the appellee was out of the car searching and digging for stolen items.[4] Viewing this matter in the

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[4] We believe that this crucial fact distinguishes this case from our holding in *Childs v. State*, 584 S.W.2d 783 (Tenn. 1979), in which we found that a defendant was not questioned while "in custody," even though he was questioned by officers while

totality of the circumstances, therefore, we conclude that a reasonable person in the appellee's position would have considered himself or herself deprived of freedom of movement to a degree associated with formal arrest.

The next issue in this case is whether the appellee was subjected to interrogation while he was in custody. Although the *Miranda* Court defined interrogation as "questioning initiated by law enforcement officers," 384 U.S. at 444, the Supreme Court has since made clear that interrogation is not limited to express questioning by officers. In *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980), the Court stated that interrogation "refers not only express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit incriminating information." Included within this definition is any "practice that the police should know is likely to evoke an incriminating response from a suspect." *Id.*

The present case is unlike those usually applying the *Innis* rationale, however, because it does not involve subtle police tactics designed to elicit incriminating responses; rather, it involves direct, express questioning of the appellee by police officers. The rub in this case, though, is that the questions by the officers were follow-

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he was voluntarily accompanying police officers to the station in the back of a police car. Unlike the present case, though, the *Childs* defendant had voluntarily visited the police station previously on several occasions, and he was not handcuffed during this particular journey.

up questions to the defendant's initial voluntary statements.[5] The genuine issue in this case, therefore, is whether a defendant is subjected to interrogation when he or she initially volunteers a statement to police officers and is then asked follow-up questions by the officers concerning that initial voluntary statement.

"The bare fact of custody may not in every instance require a warning even when the suspect is aware that he is speaking to an official. . . . " *Illinois v. Perkins*, 496 U.S. 292, 299 (1990) (dicta). Nevertheless, because its proscription on express questioning without the *Miranda* safeguards is unqualified, the *Innis* definition of interrogation appears, upon first reading, to exclude from evidence all answers to express questioning while the defendant is in custody. No case has ever extended the holding of *Innis* this far, however, and several types of express questions have been permitted by state and federal courts when (1) the questions do not infringe upon "the underpinnings of *Miranda*," or (2) those underpinnings are outweighed by other concerns. For example, officers are permitted to ask questions that reveal non-testimonial information, *see*,

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[5] Although it seems exceedingly unlikely that the appellee suddenly volunteered to share his knowledge of the whereabouts of stolen property without any prodding or questioning by the officers, there is no proof in the record to the contrary. The only witnesses at the suppression hearing were the police officers, who all testified that the appellee volunteered the information on his own, without any "carrot" being given or offered by the police. With no proof or evidence to the contrary, the trial court's finding that the appellee's initial statements were voluntary is certainly in accord with the weight of the evidence, and as such, we are bound by this finding on appeal.

e.g., Pennsylvania v. Muniz, 496 U.S. 582, 591-92 (1990) (permitting questions that were designed to reveal non-testimonial evidence such as slurred speech); *United States v. Dionisio*, 410 U.S. 1 (1973) (permitting voice exemplars), and officers may ask questions relevant to routine booking procedures at the police station, *Muniz*, 569 U.S. at 601-02; *see also State v. Williams*, 623 S.W.2d 118, 121 (Tenn. Crim. App. 1981) (stating that *Miranda* does not apply to routine questions such as "the subject's name, address, date of birth, height, weight, location of arrest and charge").[6] In addition, the Supreme Court has

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[6] The *Muniz* Court stated that asking questions during routine booking procedures did in fact amount to custodial interrogation. 496 U.S. at 601 ("We disagree with the Commonwealth's contention that Officer Hosterman's first seven questions regarding Muniz's name, address, height, weight, eye color, date of birth, and current age do not qualify as custodial interrogation as we defined the term in *Innis*, merely because the questions were not intended to elicit information for investigatory purposes."). However, so long as the questions were not designed to elicit incriminating information, *id.* at 602 n.14, the answers to those questions were admissible under the "routine booking question" exception, "which exempts from *Miranda*'s coverage questions to secure the 'biographical data necessary to complete booking or pretrial services,' " *id.* at 601.

In *State v. Cobb*, 539 P.2d 1140 (Ore. Ct. App. 1975), the Oregon Court of Appeals recognized that while a question may be of a "routine and relatively administrative nature" in one case, the very same question could constitute "interrogation" in another case. The key difference for that court was whether the police action was either intended or reasonably likely to elicit incriminating information. *Id.* at 1143 (citing McCormick, *Evidence* § 152, at 327, 329 (2d ed. 1972)).

upheld the questioning of a defendant when the questioning was necessary to prevent a threat to public safety. *See New York v. Quarles*, 467 U.S. 649 (1984).

The United States Supreme Court has yet to specifically address whether follow-up questions by officers to a defendant's voluntary statements are permitted, especially when the officers have reason to suspect that the answers to the follow-up questions are likely to be incriminating. Some courts addressing this issue have held that the answers to follow-up questions are merely a continuation of the defendant's initial voluntary statement. For example, the Nebraska Court of Appeals has held that because follow-up questions by officers to a defendant's voluntary statement are not prohibited by *Rhode Island v. Innis*, such questions are permitted, and the answers are admissible. *See State v. McDowell*, 488 N.W.2d 593, 597-98 (Neb. Ct. App. 1992) ("However, the record does show that after [the defendant] made a statement to Murtaugh, Brady then asked [the defendant] if there was something he wanted to say. *Innis* does not prohibit such follow[-]up questions. Therefore, [the defendant's] answer to Brady's question was a continuation of his volunteered statement, and the officers were not required to advise him of his *Miranda* rights at that time.").

The greater weight of authority, however, seems to suggest that officers should inform the suspect of his or her *Miranda* rights before asking follow-up questions to a voluntary statement when the officers "reasonably suspect" that incriminating information will be forthcoming. One court addressing this issue has stated that

> a person who volunteers facially exculpatory information to the police and whom the police do not have reason to consider a suspect, may, without being advised of his *Miranda* rights, be asked follow-up questions so long as those questions are designed to clarify the facially exculpatory prior statement. *However, once the police have reason to doubt the information, and thus to believe that any further questions would be "reasonably likely to elicit an incriminating response," they must administer the Miranda warnings before [asking] any follow-up questioning.*

Merriweather v. State, 629 So.2d 77, 83-84 (Ala. Crim. App. 1993) (citations omitted) (emphasis added); *see also United States v. Gonzalez*, 688 F.Supp. 658, 662 (D.D.C. 1988), *remanded on other grounds*, 875 F.2d 875 (D.C. Cir. 1989) ("*Miranda* does not apply to unsolicited, spontaneous and voluntary statements, not made in response to interrogation, although officers must give warnings before any follow-up questioning is resumed.").

Although *Innis* does not directly compel such a standard, we believe that the second approach is most in line with the underpinnings of *Miranda*. We acknowledge that, unlike the present case before this Court, many courts addressing this issue have done so in situations in which the defendant first asserted his or her right to remain silent and then later volunteered to speak to the police. Even so, the rationale adopted by those cases seems particularly appropriate when, as in this case, the defendant never had the benefit of the warnings in the first instance. Accordingly, we conclude that police officers are permitted to ask follow-up questions to a defendant's voluntary statement without first having to give

Miranda warnings, unless the officer has reason to believe that the follow-up questions are "reasonably likely to elicit an incriminating response." In such a case, *Miranda* warnings must be given before any answers to the follow-up questions are properly admissible. In this manner, courts can be assured that the resulting answers are truly voluntary and free from "relevant defendant ignorance." *Cf. Callahan*, 979 S.W.2d at 582; *see also* Wayne R. LaFave, et al., *Criminal Procedure* § 6.7(d), at 566-57 (2d ed. 1999) ("The better view, however, is that the part of the defendant's statement given after the follow-up questions is volunteered only if the questions are neutral attempts to clarify what has already been said rather than apparent attempts to expand the scope of the statement already made.").

Turning to the facts of this case, Officer Johnson clearly had reason to believe that his follow-up questions to the appellee's statements were "reasonably likely to elicit an incriminating response." The officer had every reason to believe that the answers to his questions would lead to the recovery of stolen property, and from all indications in the record, this was precisely the officer's hope and expectation.[7] *Cf. Innis*, 446 U.S. at 301 n.7 (stating that the intent of the officer "may well have a bearing

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[7] The fact that the location of the stolen property was derived from the express questioning of Officer Johnson distinguishes this case from *State v. Hurley*, 876 S.W.2d 57, 66 (Tenn. 1993), in which the defendant called the detective to his cell to give a full confession. The detective in *Hurley* testified that, upon receiving the defendant's call, he had no intention of interrogating the defendant but went to the cell only to hear what the defendant had to say. Moreover, with the exception of one inquiry as to why the defendant was being "set up" by

on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response"). Indeed, it is difficult to conceive of any response by the appellee that would not have been incriminating, and as such, we find that the officer first had a duty to inform the appellee of his rights before asking any follow-up questions. Accordingly, we agree with the Court of Criminal Appeals that the appellee was subjected to custodial interrogation in a violation of the requirements of *Miranda v. Arizona.*

SUPPRESSION OF EVIDENCE

Because we have found that the appellee in this case was subjected to custodial interrogation without first having been informed of his rights under *Miranda v. Arizona,* it is axiomatic that all statements made by the appellee in response to that interrogation are inadmissible as evidence. *See, e.g., Miranda,* 384 U.S. at 466 ("The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant."); *State v. Bush,* 942 S.W.2d 489, 499 (Tenn. 1997). However, the

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others, the detective in *Hurley* did not question the defendant at all, but rather only listened to his voluntary statements. This Court held that because the defendant initiated the contact with the detective and because his voluntary self-serving statements were not in response to any questioning on the part of the detective, the defendant's statements were not the product of custodial interrogation and were therefore admissible. *Hurley,* 876 S.W.2d at 66.

evidence of guilt in this case consists not only of statements made by the appellee, but also of physical evidence obtained from his "custodial expedition for incriminating evidence."[8] In vacating the appellee's plea and dismissing the charges, the Court of Criminal Appeals suppressed all of the evidence in this case, including the recovered property, finding that the failure to inform the appellee of his rights, combined with the "particular nature of [the officers'] interrogation," required suppression of the recovered physical evidence. We disagree, respectfully, that the record as developed in this case compels such a result.

FEDERAL LAW

The United States Supreme Court has not directly addressed whether physical evidence obtained from a violation of *Miranda* is admissible.[9] Absent a finding that

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[8] This is how the Court of Criminal Appeals adeptly characterized the appellee's afternoon journey with the officers on May 22, 1997. *See State v. Walton*, No. 02C01-9807-CC-00210, 1999 WL 236459, slip op. at 11 (Tenn. Crim. App. filed at Jackson April 23, 1999).

[9] Such a result was suggested by *Miranda* itself, although Justice White's dissenting opinion made clear that the Court was leaving the issue for consideration at a later date. *Compare Miranda*, 384 U.S. at 479 ("But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him."), *with Miranda*, 384 U.S. at 454 (White, J., dissenting) ("Today's decision leaves open such questions as . . . whether non-testimonial evidence introduced at trial is the fruit of statements made during a prohibited interrogation."); *see also Patterson v. United States*, 485 U.S. 922,

a statement was involuntary, we note that *Miranda*'s exclusion of incriminating statements has never been absolute. *See, e.g., Harris v. New York,* 401 U.S. 222, 226 (1971) (permitting use of unwarned, voluntary statements to impeach a witness). Furthermore, as several cases make clear, the Fifth amendment applies only to testimonial or communicative evidence, *see, e.g., Schmerber v. California,* 384 U.S. 757 (1966); *United States v. Dionisio,* 410 U.S. 1 (1973), and as such, all non-testimonial evidence would seem to fall outside the scope of the "fruit of the poisonous tree" doctrine as applied to the Fifth Amendment.[10] Nevertheless, as the Supreme Court acknowledged in *Michigan v. Tucker,* 417 U.S. 433 (1974), the

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922-24 (1988) (White and Brennan, JJ., dissenting from a denial of certiorari) (noting that *Miranda, Michigan v. Tucker,* 417 U.S. 433 (1974), and *Oregon v. Elstad,* 470 U.S. 298 (1985), have all left open the question of the "admissibility of physical evidence yielded from a *Miranda* violation").

[10] In *Schmerber v. California,* the Court first hinted that only testimonial evidence may be excluded by a violation of the Fifth Amendment. In holding that the blood test evidence at issue was "not inadmissible" on privilege grounds, the Court reasoned that "although an incriminating product of compulsion, [it] was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner. . . . " 384 U.S. at 765. Having decided *Miranda* only seven days earlier, the Court then noted that

> [t]his conclusion would not necessarily govern had the State tried to show that the accused had incriminated himself when told that he would have to be tested. Such incriminating evidence may be an unavoidable by-product of the compulsion to take the test, especially for an individual who fears the extraction or opposes it on religious grounds. If it wishes to compel persons to submit to such attempts to discover evidence, *the State may have to forgo the*

exclusionary rule may be applied in the Fifth Amendment context given the proper case. *See* 417 U.S. at 447.

While not addressing the precise issue before us today, the Supreme Court has had occasion to address whether some fruits of a *Miranda* violation need to be suppressed. For example, in *Tucker*, a defendant sought to suppress the testimony of a state witness whose identity was disclosed through unwarned statements made by the defendant during a custodial interrogation. In permitting the witness's testimony, the Court held that unwarned questioning of the defendant "did not abridge [the defendant's] constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege." *Tucker*, 417 U.S. at 446. In answering "how sweeping the judicially imposed consequences of this disregard shall be," the Court declined to suppress the fruit of the violation, or the testimony of the State's witness, in the absence of a need to deter police conduct or a need to protect against unreliable evidence resulting from actual coercion. *Id.* at 447-49.

A similar rationale was later used in *Oregon v. Elstad*, 470 U.S. 298 (1985), in which the Court permitted a second voluntary confession to be used as evidence after the

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> *advantage of any testimonial products of administering the test – products which would fall within the privilege.*

Id. at 765 n.9 (emphasis added). As this statement demonstrates, the *Schmerber* Court believed that while a *Miranda* violation would render any resulting statements inadmissible, the non-testimonial evidence, such as the blood tests, could still be used as evidence of guilt notwithstanding the *Miranda* violation.

defendant's first voluntary confession was obtained in violation of *Miranda*. The *Elstad* Court stated that while the "fruit of the poisonous tree" doctrine called for suppression of evidence upon a finding of a Fourth Amendment violation, the same result did not necessarily follow when officers erred "in administering the prophylactic *Miranda* procedures." *Elstad*, 470 U.S. at 309. Unless a court finds "any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will," a technical violation of *Miranda* "should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself."[11] *Id.* Finding that the first confession was given voluntarily and without any actual coercion, the Court permitted the second confession into evidence, stating that "little justification exists for permitting the highly probative evidence of a voluntary confession to be irretrievably lost to the factfinder." *Id.* at 312. Although the *Elstad* Court specifically declined to reach the question of whether its rationale would admit non-testimonial evidence obtained after a violation of *Miranda*, several lower federal courts have permitted such evidence in the absence of actual coercion.[12]

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[11] "Where an unwarned statement is preserved for use in situations that fall outside the sweep of the *Miranda* presumption, the 'primary criterion of admissibility [remains] the "old" due process voluntariness test.' " *Elstad*, 470 U.S. at 307-08 (quoting Stephen J. Schulhofer, *Confessions and the Court*, 79 Mich. L. Rev. 865, 877 (1981)).

[12] *See, e.g., United States v. Crowder*, 62 F.3d 782, 786 (6th Cir. 1995) (stating that "non-testimonial physical evidence, such as the shotgun, discovered due to an unwarned statement is admissible if the unwarned statement was voluntary"); *United*

Although the *Tucker* and *Elstad* rationales have been followed by other courts, a recent decision from the United States Supreme Court has cast some doubt as to the true nature of *Miranda*'s procedures. In *Dickerson v. United States*, 530 U.S. 428 (2000), the United States Supreme Court held that *Miranda* was a constitutional decision that could not be legislatively overruled by Congress, and at least one court has asserted that this holding significantly undermines the rationales of *Tucker* and *Elstad* to the extent that these cases would permit nontestimonial fruits of a *Miranda* violation. In *People v. Trujillo*, 2000 WL 1862933 (Colo. Ct. App. Dec. 21, 2000), the Colorado Court of Appeals rejected an argument that the exclusionary rule did not apply in the Fifth Amendment context and found that *Dickerson* essentially elevated *Miranda*'s procedures to that of constitutional requirements.[13]

States v. Mendez, 27 F.3d 126, 130 (5th Cir. 1994) ("The derivative evidence rule operates [in the *Miranda* context] only when an actual constitutional violation occurs, as where a suspect confesses in response to coercion."); *United States v. Gonzalez-Sandoval*, 894 F.2d 1043, 1048 (9th Cir. 1990) (admitting deportation record obtained in violation of *Miranda* absent coercion or a denial of due process); *United States v. Bengivenga*, 845 F.2d 593, 600-01 (5th Cir. 1988) (admitting bus ticket and baggage claim stubs obtained from *Miranda* violation); *United States v. Sangineto-Miranda*, 859 F.2d 1501, 1514-19 (6th Cir. 1988) (admitting contraband discovered as a result of a *Miranda* violation); *United States v. Morales*, 788 F.2d 883, 886 (2d Cir. 1986) (permitting statement obtained in violation of *Miranda* to be used in establishing probable cause to arrest).

[13] More specifically, the Colorado Court of Appeals dismissed the issue stating that

> [t]he People rely on *Oregon v. Elstad*, 470 U.S. 298 (1985), in which the Supreme Court held that *Miranda*

After carefully considering *Dickerson*, we disagree that its rationale now compels application of the exclusionary rule to non-testimonial evidence for a failure to give *Miranda* warnings. While we acknowledge that the rationales of *Tucker* and *Elstad* depended upon the fact that a violation "in administering the prophylactic *Miranda* procedures" was not, without more, a violation of the Fifth Amendment itself, *Dickerson* did not hold otherwise. Importantly, *Dickerson* did not overrule *Tucker* or *Elstad*, nor did it repudiate the reasoning adopted by these cases. In fact, *Dickerson* even approved of *Elstad*'s language concerning *Miranda*'s "prophylactic" procedures as recognition of "the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment." *Id.* at ___. With its express acknowledgment that the exclusionary rule operates differently under the Fifth Amendment, *Dickerson* is more properly read to reaffirm that *Miranda*'s specific procedures are still prophylactic in nature.

The reasoning adopted by the Colorado Court of Appeals in *Trujillo* seems to closely follow Justice Scalia's

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violations, being "procedural," did not mandate application of the "fruit of the poisonous tree" analysis set forth in *Wong Sun v. United States*, 371 U.S. 471 (1963). However, in *Dickerson v. United States*, 530 U.S. 428 (2000), the Supreme Court held that *Miranda* announced a constitutional, not a procedural rule, and specifically distinguished *Oregon v. Elstad*, on that basis. Accordingly, we conclude that the "fruit of the poisonous tree" analysis employed in *James v. Illinois*, applies here.

dissent in *Dickerson*, wherein the view was expressed that *Miranda*'s requirements are now the only measures that can satisfy constitutional concerns. Certainly if this were true, then one would be compelled to conclude that a violation of *Miranda* is also now a violation of the Fifth Amendment. We disagree, however, that such a reading naturally follows from the majority's decision, if only because this reading is contradicted by the language of the opinion itself. Not only did the majority plainly refuse to extend its holding that far,[14] but the majority also limited its decision to holding that the "totality of the circumstances" test, without more, is inadequate to protect the privilege against self-incrimination.[15] Indeed, when read in this context, *Dickerson* practically does little more than did *Miranda* itself, which, in holding that the "totality of the circumstances" test was insufficient to safeguard Fifth Amendment protections, was clear that the constitution did not require any particular set of procedures. *See Miranda*, 384 U.S. at 467 ("We cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted.").[16]

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[14] *Dickerson*, 530 U.S. at ___ ("The dissent argues that it is judicial overreaching for this Court to hold [section] 3501 unconstitutional unless we hold that the Miranda warnings are required by the Constitution, in the sense that nothing else will suffice to satisfy constitutional requirements. But we need not go farther than Miranda to decide this case.") (citation omitted).

[15] *Dickerson*, 530 U.S. at ___ ("As discussed above, [section] 3501 reinstates the totality test as sufficient. Section 3501 therefore cannot be sustained if *Miranda* is to remain the law.").

[16] In further recognition that the specific *Miranda* procedures themselves were not constitutionally required, the

Moreover, merely recognizing that *Miranda* is a decision of constitutional law does not mean that a violation of the particular procedures set forth in that decision must also be a violation of the constitution itself. For example, this Court has long recognized that the *Miranda* decision is one of a constitutional nature, as we have repeatedly perceived ourselves to be bound by that decision. *See, e.g., Shannon v. State*, 221 Tenn. 412, 420, 427 S.W.2d 26, 29 (1968) (recognizing *Miranda* as a constitutional decision and stating that "[l]et it be noted that the concern of this Court is not to favor a defendant but to see that the scales of justice be in balance between him and the State, which cannot be if the constitutional guarantees of *Miranda* can be withheld by its officers"). In so recognizing, however, we have never viewed the failure to administer the *Miranda* warnings as an actual violation

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Miranda Court even invited Congress to develop alternative procedures to protect the privilege against self-incrimination. *See* 384 U.S. at 490 ("[T]he Constitution does not require any specific code of procedures for protecting the privilege against self-incrimination during custodial interrogation. Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it."). As it is well established that Congress is without power to define substantive constitutional rights, *see City of Boerne v. Flores*, 521 U.S. 507, 519 (1997), the particular warnings outlined in *Miranda* cannot themselves be coterminous with the Fifth Amendment. We believe that the *Dickerson* Court recognized this crucial fact and limited its opinion accordingly by holding simply that Congress failed to rise to the *Miranda* Court's challenge of issuing adequate safeguards for the protection of the Fifth Amendment.

of the Fifth Amendment, which would thereby compel suppression of all the fruit of that violation. *Cf. State v. Crump*, 834 S.W.2d 265, 270 (Tenn. 1992) (recognizing that the mere failure to administer warnings, as opposed to a failure to honor invocation of rights, is not itself a Fifth Amendment violation); *State v. Smith*, 834 S.W.2d 915, 919-21 (Tenn. 1992) (admitting fruits of a *Miranda* violation upon a finding that the defendant's second confession was "given knowingly and voluntarily," and was not the result of "coercive tactics" or efforts "to wear down Smith's resistance and overcome his free will"). The majority's opinion in *Dickerson* does not now compel a different result for our cases.

Prior to *Dickerson*, the federal courts seem to have largely favored admitting non-testimonial evidence derived from a violation of *Miranda*, absent actual coercion of the defendant's statements. We do not view *Dickerson* as now compelling a finding that a failure to administer *Miranda* warnings is itself a violation of the Fifth Amendment. We also disagree that *Dickerson* compels the conclusion that a violation of *Miranda* mandates a *per se* exclusionary rule for all fruits of that violation. Accordingly, although we acknowledge that this issue has yet to be definitively settled by the United States Supreme Court, we recognize that the clear trend under the federal constitution is to admit non-testimonial evidence, so long as the statements revealing the non-testimonial evidence were not coerced.

TENNESSEE LAW

Although this Court has expressly rejected the *Tucker* and *Elstad* rationales with regard to admission of a subsequent confession obtained after an initial unlawful confession, *State v. Smith,* 834 S.W.2d 915, 921 (Tenn. 1992), the same approach does not necessarily follow under Article I, section 9 of the Tennessee Constitution when the issue is admission of tangible, non-testimonial evidence. As is the case with the Fifth Amendment, Article I, section 9 is concerned only with a defendant's coerced, self-incriminating *statements,* and this provision has never been interpreted to provide a *per se* exclusion of non-testimonial evidence. *See State v. Frasier,* 914 S.W.2d 467, 473 (Tenn. 1996) (declining to adopt "a literal interpretation of the term 'evidence' " in Article I, section 9 by maintaining the traditional Fifth Amendment distinction between testimonial and non-testimonial evidence); *Delk v. State,* 590 S.W.2d 435, 440 (Tenn. 1979) ("We do not agree that the Tennessee prohibition against self-incrimination is broader or different in any application thereof because of the use of the word 'evidence' instead of the word 'witness.' "). Moreover, "[a]bsent some officially coerced self-accusation," the privilege against self-incrimination "is not violated by even the most damning admissions." *State v. Williams,* 623 S.W.2d 118, 121 (Tenn. Crim. App. 1981).

Indeed, courts in this state have permitted the "fruits" of a *Miranda* violation when the fruit is not that of a subsequent confession by the defendant. For example, in *State v. Tidwell,* 775 S.W.2d 379 (Tenn. Crim. App. 1989), the Court of Criminal Appeals admitted the testimony of a witness whose identity was discovered

through unwarned custodial interrogation. In addressing the defendant's argument that the testimony of another witness should have been suppressed as fruit of the violation, the court stated that

> [t]he defendant's argument confuses the scope of the exclusionary rule in Fourth Amendment cases with the exclusionary rule in Fifth Amendment cases. The Fifth Amendment exclusionary rule is limited in scope to the exclusion of confessions obtained in violation of an accused's constitutional rights. *Evidence derived from an illegally obtained confession is admissible notwithstanding the confession was, or should have been, suppressed.* There is one exception to this rule. If the confession from which the evidence was derived was coerced in the due process sense, the evidence is not admissible. This exception is not applicable in the case *sub judice.*

Id. at 388 (emphasis added) (citations omitted).[17] Likewise, in *State v. Kyger,* 787 S.W.2d 13, 24 (Tenn. Crim. App. 1989), the Court of Criminal Appeals addressed whether a defendant's consent to provide "fingerprints, photographs, [and] handswabs" following an illegal custodial interrogation should have been suppressed. In allowing the admission of the non-testimonial evidence,

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[17] While other cases from the Court of Criminal Appeals hold that witnesses discovered from an illegal statement should be suppressed, these cases arise in the context of a statement made following an illegal arrest in actual violation of the Fourth Amendment. *See State v. Williams,* 784 S.W.2d 660 (Tenn. Crim. App. 1989); *State v. Story,* 608 S.W.2d 599 (Tenn. Crim. App. 1980).

the court stated that "[e]vidence derived from an uncoerced confession illegally obtained through such a [*Miranda*] violation may be admissible notwithstanding whether the confession was or should have been suppressed." *Kyger,* 787 S.W.2d at 24.

Although this Court has yet to address this issue with regard to non-testimonial evidence since *Miranda,* we have previously admitted evidence obtained from an illegal confession, even though the confession itself was excluded. In *Rice v. State,* 50 Tenn. (3 Heisk.) 215 (1871), the prosecutor improperly induced a defendant to reveal the location of stolen money orders, and the defendant gave a full confession revealing the location of the property. The defendant was then indicted for larceny and for knowingly receiving stolen goods with the intent to deprive the true owner thereof. In permitting the physical evidence obtained from the confession, the Court stated that "although a confession obtained by means of promises or threats cannot be received; yet if, in consequence of that confession, certain facts tending to establish the guilt of the prisoner, are made known, evidence of these facts may be received." *Id.* at 223. The *Rice* Court allowed the jury to consider "the fact of the witness having been directed by the prisoner where to find the goods, and his having found them accordingly," though it did not allow "the acknowledgment [through the confession] of the prisoner having stolen or put them there." *Id.* at 224-25.[18]

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[18] As the concurring/dissenting poignantly explains, to the extent that actual coercion was involved in *Rice* to obtain the confession, the fruits of that confession would be inadmissible today. However, the larger point illustrated by this Court's

Given these federal and state authorities, we conclude that a *per se* exclusionary rule, which would automatically exclude non-testimonial evidence obtained from a technical failure to give *Miranda* warnings, is not warranted. Instead, we hold that a defendant may seek suppression of non-testimonial evidence discovered through his or her unwarned statements only when the statements are the product of an actual violation of the privilege against self-incrimination, *i.e.*, such as when actual coercion in obtaining the statement is involved or when the invocation of the right to remain silent or to have counsel present is not "scrupulously honored." *Cf. State v. Crump*, 834 S.W.2d 265, 270 (Tenn. 1992) (holding that a refusal to honor the right to remain silent, "by definition, is of constitutional magnitude"). In those cases in which the fruit of the violation involves the defendant's testimonial or communicative statements, however, the heightened protections of *State v. Smith*, 834 S.W.2d 915 (Tenn. 1992), safeguarding the privilege continue to apply with full force in this state, and our decision today should not be read as diminishing the concerns expressed by *Smith* in any way.

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decision in *Rice* is that a *per se* exclusion of all fruits of a confession has never been required by the constitution or laws of this state. To that extent, *Rice* lends great weight to our conclusion that Article I, section 9 – which had been the law in Tennessee for three quarters of a century prior to that decision, *see* Tenn. Const. art. XI, § 9 (1796) – does not necessarily compel exclusion of physical evidence discovered from an unlawful confession.

The concurring/dissenting opinion expresses the concern that allowing non-testimonial evidence represents "a gross incursion upon the letter and spirit of *Miranda*, and tends to invite open defiance and disregard of the *Miranda* doctrine by those bound to respect it. . . . " We are certainly mindful of this concern, but we disagree that today's decision will invite open defiance of *Miranda*. We reiterate that where law enforcement officers act in actual violation of the federal or state constitutions, their actions will bring forth heavy consequences – all "fruit" resulting from the violation, testimonial and non-testimonial together, will not be permitted to be used as evidence. The judiciary of this state will not tolerate actual police coercion, either physical or psychological, used to obtain statements from a suspect, and as has been expressed in other areas of the law, it is not unfair "to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line ." *See Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952). This is the price demanded for jealous protection of constitutional liberties.

In the absence of a need to deter constitutional violations, however, the demand for such a heavy-handed remedy is simply not as compelling, and the broad exclusionary rule advocated by the concurring/dissenting opinion will undoubtedly work to penalize even legitimate law enforcement activity. In the absence of actual coercion, the price of excluding relevant, probative, and reliable evidence may be proportionally too expensive, especially when the interest of the accused is simply that of not

being *compelled to testify* against himself.[19] Indeed, this view is precisely that expressed by Justice O'Connor's concurring-dissenting opinion in *New York v. Quarles*, 467 U.S. 649 (1984), wherein she stated that

> [t]o be sure, admission of nontestimonial evidence secured through informal custodial interrogation will reduce the incentives to enforce the *Miranda* code. But that fact simply begs the question of how much enforcement is appropriate. . . . *The Miranda decision quite practically does not express any societal interest in having those warning[s] administered for their own sake. Rather, the warnings and waiver are only required to ensure that "testimony" used against the accused at trial is voluntarily given.* Therefore, if the testimonial aspects of the accused's custodial communications are suppressed, the failure to administer the *Miranda* warnings should cease to be of concern. The harm caused by failure to administer *Miranda* warnings relates only to admission of

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[19] In cases involving statements following an initial unlawful confession, *see State v. Smith*, 834 S.W.2d 915, 921 (Tenn. 1992), the interest involved is precisely that of preventing one from being *compelled to testify* against himself. In those types of cases, therefore, the approach advocated by the concurring/dissenting opinion is a much more practical remedy because it is designed to further the actual right at issue. As no defendant is privileged to have non-testimonial evidence excluded under the Fifth Amendment or Article I, section 9, exclusion of such evidence in the absence of a constitutional violation (1) adds very little to the accused's interest in not being compelled to testify against himself, and (2) adds significant and unnecessary barriers to the use of otherwise legitimate law enforcement practices.

> testimonial self-incriminations, and the suppression of such incriminations should by itself produce the optimal enforcement of the *Miranda* rule.

New York v. Quarles, 467 U.S. at 668-69 (1984) (O'Connor, J., concurring) (emphasis added) (footnote and citations omitted); *see also Tucker*, 417 U.S. at 462 (White, J., concurring) ("The arguable benefits from excluding such [evidence] by way of possibly deterring police conduct that might compel admissions are, in my view, far outweighed by the advantages of having relevant and probative [evidence], not obtained by actual coercion, available at criminal trials to aid in the pursuit of truth. The same results would not necessarily obtain with respect to the fruits of involuntary confessions.").

The assumption underlying the view of the concurring/dissenting opinion is that law enforcement officers will forgo the opportunity to gain a valid, voluntary confession merely for the sake of obtaining non-testimonial evidence of dubious probative value. As courts have recognized, however, a confession by a defendant is "like no other evidence,"[20] and the sheer power of an

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[20] *See Arizona v. Fulminante*, 499 U.S. 279, 296 (1991); *see also Bruton v. United States*, 391 U.S. 123, 139-40 (1968) (White, J., dissenting):

> [T]he defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. Though itself an out-of-court statement, it is admitted as reliable evidence because it is an admission of guilt by the defendant and constitutes direct evidence of the facts to which it relates. Even the testimony of an eyewitness may be

admission of guilt is precisely the reason that we go to extraordinary lengths to ensure that it is reliable, *i.e.*, voluntarily made without compulsion or coercion, and that it is corroborated by some other evidence. *See State v. Smith*, 24 S.W.3d 274, 281 (Tenn. 2000).

It is difficult to believe that law-enforcement officers would risk exclusion of a confession, the most probative and powerful evidence of guilt, merely for the possibility of obtaining other evidence of indeterminate probative value, and practically speaking, we doubt that this would ever be the case. Indeed, in this state, if the statements leading to the discovery of the physical evidence are actually coerced in any way, either physically or psychologically, then *all* of the statements and physical evidence discovered therefrom will be excluded, and the state may be without any evidence to prosecute the crime. While we are mindful of the theoretical concerns expressed by the concurring/dissenting opinion, we believe that the current framework of *Miranda* as developed by the courts of this state adequately prevents such concerns from becoming a reality.[21]

> less reliable than the defendant's own confession. An observer may not correctly perceive, understand, or remember the acts of another, but the admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.

[21] The concurring/dissenting opinion minimizes the ability of the courts to determine when coercion has been used in

Turning to the facts of this case, we see no evidence of coercion by the police, either physical or psychological, in obtaining the location of the stolen property. The appellee initiated the conversation of the stolen property, and he voluntarily agreed to show the officers where the property was located. After recovering the stolen computer from the ravine, the record shows that it was the

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obtaining statements from an accused, and in advocating its broad exclusionary rule, that opinion apparently contemplates that no incriminating statement can be the product of a free will. Even *Miranda* did not accord a presumption of coercion such conclusive weight, as that opinion recognized that at least some suspects will make incriminating statements voluntarily. *See* 384 U.S. at 478. Moreover, as was recognized by the Supreme Court in *Elstad*,

> There is a vast difference between the direct consequences flowing from coercion of a confession by physical violence or other deliberate means calculated to break the suspect's will and the uncertain consequences of disclosure of a "guilty secret" freely given in response to an unwarned but noncoercive question, as in this case. [The] contention that it is impossible to perceive any causal distinction between this case and one involving a confession that is coerced by torture is wholly unpersuasive. . . . *It is difficult to tell with certainty what motivates a suspect to speak. A suspect's confession may be traced to factors as disparate as "a prearrest event such as a visit with a minister," or an intervening event such as the exchange of words respondent had with his father. We must conclude that, absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion.*

470 U.S. at 312-14 (footnote and citations omitted) (emphasis added).

appellee who then asked the officers whether he could show them other property. Even while back at his own house later in the afternoon, the appellee produced several heaters and a step ladder, apparently on his own volition without any prodding or questioning by the officers. Furthermore, we can find no threats of prosecution for other offenses, nor can we find any evidence that the appellee's actions were "compelled by promises of leniency." *Cf. State v. Smith*, 933 S.W.2d 450, 456 (Tenn. 1996) ("The Fifth Amendment does not condemn all promise-induced admissions and confessions; it condemns only those which are compelled by promises of leniency.").[22] Quite simply, we see no indication that the officers' actions represented "an effort to wear down [the appellee's] resistance and overcome his free will." *Cf. Smith*, 834 S.W.2d at 920.

We note that the Court of Criminal Appeals reached the opposite conclusion on this issue, finding that the totality of the circumstances indicated that the appellee was coerced into revealing the location of the stolen property. In particular, the intermediate court relied heavily upon the fact that the appellee was in custody

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[22] There is a hint throughout the appellee's pleadings in the trial court that the police had information of the stolen property and that the police agreed not to prosecute the appellee if he would help gather evidence against Charlie Thompson. While Officer Johnson testified that the officers were in fact aware of some of the stolen items, such as the rifle and scope, all of the officers denied making any statements or promises of leniency. No proof whatsoever was introduced by the appellee of these promises, and as such, we cannot say that the finding of the trial court as to the voluntariness of the appellee's statements is against the weight of the evidence.

and in handcuffs during the entire expedition. Although these facts are undisputed, we disagree that they alone converted the situation into one that was unduly coercive. As this Court has recognized, if custody were alone "sufficient to vitiate the voluntariness of a subsequent confession, an accused could never give a voluntary confession after arrest." *Smith*, 834 S.W.2d at 920.[23] Moreover, while the Court of Criminal Appeals also found coercion in part from the failure to administer the *Miranda* warnings, "[t]he failure of police to administer *Miranda* warnings does not mean that the statements received have actually been coerced, but only that courts will presume that the privilege against compulsory self-incrimination has not been intelligently exercised." *Elstad*, 470 U.S. at 310. Accordingly, viewing the matter within the totality of the circumstances, we agree with the trial court that no actual coercion was involved in this case, and we hold that the fruit of the *Miranda* violation, *i.e.*, the physical property recovered, need not be suppressed.

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[23] Indeed, neither the Fifth Amendment nor Article I, section 9 applies to evidence that is disclosed voluntarily and free from compulsion, even without the requisite warnings. *See State v. Hurley*, 876 S.W.2d 57, 66 (Tenn. 1993); *see also Miranda*, 384 U.S. at 478 ("The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. . . . Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.").

CONCLUSION

In summary, we hold that the appellee in this case was subjected to custodial interrogation in violation of the requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966). As such, any statements made by the appellee in response to such interrogation are suppressed. Nevertheless, because all of the appellee's statements in this case were voluntary and not the product of actual coercion or other efforts designed to overcome his will, we hold that the physical evidence recovered as fruit of that violation need not be suppressed. The judgment of the Court of Criminal Appeals is affirmed in part and reversed in part.

In the trial court, the appellee pleaded guilty reserving a certified question of law thought by the parties and both lower courts to be dispositive of the case, and we accepted jurisdiction on this basis. However, through our analysis of, and consultation with, various legal authorities, we have determined that the *Miranda* violation was in fact not dispositive of the case because not all fruits of that violation need to be suppressed. *See State v. Wilkes*, 684 S.W.2d 663, 667 (Tenn. Crim. App. 1984) (stating that an issue is deemed to be dispositive when the appellate court "must either affirm the judgment or reverse and dismiss"). As such, we can neither affirm the judgment of the trial court as it stands, because some of the evidence considered was certainly inadmissible, nor can we reverse and dismiss the case, because the physical evidence against the appellee is properly considered as evidence of guilt.

Although we do not accept jurisdiction when the certified question is not dispositive of the case, *State v.*

Preston, 759 S.W.2d 647, 651 (Tenn. 1988) ("If the appellate court does not agree that the certified question is dispositive, appellate review should be denied."), the non-dispositive nature of this issue did not come to light until after this Court granted permission to appeal and heard argument by the parties. Under the special circumstances of this case, especially given that the suppression issue was one of first impression for this Court, we felt it appropriate to address the issue as stated in the certification and as accepted for appeal by this Court and the Court of Criminal Appeals. *See State v. Jennette*, 706 S.W.2d 614, 617 (Tenn. 1986). We hasten to add, however, that this decision today in no way signals a departure from the rule that appellate review will be denied when the issues certified for review are in fact not dispositive of the case. *See* Tenn. R. Crim. P. 37(b)(2)(i).

As a final note, we observe that when the appellee pleaded guilty to the charges of burglary and aggravated burglary, he did so with the expectation that his statements to the police were admissible as evidence against him. Because the *Miranda* violation in this case requires suppression of the appellee's statements made in response to interrogation, the appellee's initial presumption concerning the evidence to be presented against him was not accurate. Consequently, in the exercise of our discretion to fashion appropriate relief under the circumstances of each individual case, *see* Tenn. R. App. P. 36(a), we remand this case to the Dyer County Circuit Court, giving the appellee the opportunity to withdraw his original plea should he so desire.

Costs of this appeal shall be taxed equally against the appellant, the State of Tennessee, and the appellee, Timothy Walton.

/s/ William M. Barker
WILLIAM M. BARKER, JUSTICE

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON
November 16, 2000 Session

STATE OF TENNESSEE V. TIMOTHY WALTON

Appeal by Permission from the
Court of Criminal Appeals
Circuit Court for Dyer County
No. C97-205 R. Lee Moore, Jr., Judge

No.W1998-00329-SC-R11-CD

(Filed March 15, 2001)

ADLOPHO A. BIRCH, JR., J., concurring and dissenting

I agree with the majority that the State violated the requirements of *Miranda v. Arizona* by subjecting Walton to custodial interrogation without informing him of his Constitutional rights. *See generally* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Thus, I concur in the conclusion that Walton's incriminating statements should be suppressed. The majority fails, however, to take the next logical step, which would be to suppress also the physical evidence obtained as a direct result of the *Miranda* violation. Because this failure constitutes, in my opinion, a gross incursion upon the letter and spirit of *Miranda* and tends to invite open defiance and disregard of the *Miranda* doctrine by those bound to respect it, I must respectfully dissent.

As conceded by the majority, the issue whether physical evidence should be suppressed if discovered by means of a *Miranda* violation has never been directly

addressed by the United States Supreme Court or by this Court. Majority opn. at 23, 32. Nevertheless, despite the absence of clear precedent, the majority concludes that "the clear trend under the federal constitution" is to admit physical evidence obtained in violation of *Miranda*. *Id.* at 29. The authorities relied upon by the majority, however, provide questionable support for the rule it has established. *Michigan v. Tucker* recognized that a defendant could not suppress the testimony of a state witness whose identity was disclosed through statements made by the defendant during a custodial interrogation in violation of *Miranda*. *See generally Tucker*, 417 U.S. 433, 94 S. Ct. 2357, 41 L. Ed. 2d 182 (1974). Live witnesses, however, always have been treated differently than inanimate evidence, even under the broader exclusionary rule jurisprudence of the Fourth Amendment. *See, e.g., United States v. Ceccolini*, 435 U.S. 268, 280, 98 S. Ct. 1054, 1062, 55 L. Ed. 2d 182 (1974) (holding that the Fourth Amendment exclusionary rule "should be invoked with much greater reluctance where the claim is based on a causal relationship between a constitutional violation and the discovery of a live witness than when a similar claim is advanced to support suppression of an inanimate object"). Likewise, the focus of *Oregon v. Elstad* was whether a suspect's voluntary confession was "tainted" by an earlier, improper confession obtained in violation of *Miranda*. *See generally Elstad*, 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985). This is a proposition clearly distinguishable from the question whether evidence should be admitted when it was obtained as a *direct* result of the *Miranda* violation itself.

And in *Rice v. State*, the principal Tennessee authority cited by the majority, the confession of the prisoner was induced by false promises that he would not be prosecuted, and that he would be given money, were he to confess his crimes. 50 Tenn. (3 Heisk.) 215 (Tenn. 1871). The greater weight of authority, however, suggests that promises of leniency or money such as were offered in *Rice* overbear the accused's free will sufficiently that a confession induced by such means should be viewed as a product of coercion. *See, e.g., United States v. Rogers*, 906 F.2d 189 (5th Cir.1990); *Sossamon v. State*, 816 S.W.2d 340 (Tex. Crim. App. 1991); *State v. Pickar*, 453 N.W.2d 783 (N.D.1990); *State v. Hanson*, 382 S.E.2d 547 (W.Va 1989); *Walker v. State*, 233 N.E.2d 483 (Ind. 1968); *State v. Ely*, 390 P.2d 348 (Or. 1964); *cf. also Arizona v. Fulminate*, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) (stating that promises that induce a confession may constitute coercion when the circumstances surrounding the promise are "sufficiently compelling to overbear the suspect's will in light of . . . [those] circumstances"). Thus, it appears that the physical evidence which was admitted in *Rice* would likely be suppressed under the majority's own analysis, since the physical fruits of a coerced confession would not be admissible even under the standard it proposes. Accordingly, *Rice* lends little weight to the majority's argument that physical fruits of a *Miranda* violation should be admissible as evidence.

The better method, in my view, for determining whether physical fruits of a *Miranda* violation should be suppressed would be to consider the interests served by *Miranda*'s exclusionary rule and determine whether those interests would be advanced by applying the rule to

physical evidence. The right protected by *Miranda* is the Fifth Amendment right against self-incrimination, which prohibits the State from compelling a defendant "in any criminal case to be a witness against himself." U.S. Const. amend. V; *Miranda v. Arizona*, 384 U.S. at 439, 86 S. Ct. at 1609. That same right against self-incrimination is also protected by Article I, section 9 of the Tennessee Constitution, which this Court regards as even "broader and more protective of individual rights" than the Fifth Amendment. *See State v. Crump*, 834 S.W.2d 265, 268 (Tenn.1992). With its holding in *Miranda*, the United States Supreme Court responded to the advent of modern custodial police interrogation techniques, which "brought with it an increased concern about confessions obtained by coercion." *Dickerson v. United States*, 530 U.S. 428, ___, 120 S. Ct. 2326, 2331, 147 L. Ed. 2d 405 (2000); *Miranda*, 384 U.S. at 445-58, 86 S. Ct. at 1612-19. The *Miranda* Court acknowledged that police interrogation, by its very character, subjects the accused to formidable pressure and isolation, and it concluded that "[e]ven without employing brutality, the 'third degree' or [other] specific stratagems . . . the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals." 384 U.S. at 455, 86 S. Ct. at 1617-18. As noted by the Court in a subsequent case upholding *Miranda*, "the coercion inherent in custodial interrogation *blurs the line between voluntary and involuntary statements*, and thus heightens the risk that an individual will not be 'accorded his privilege under the Fifth Amendment . . . not to be compelled to incriminate himself.' " *Dickerson*, 530 U.S. at ___, 120 S. Ct. at 2331 (quoting

Miranda, 384 U.S. at 439, 86 S. Ct. at 1609) (emphasis added).

Thus, the Court fashioned the requirements of *Miranda* in response to the necessity for procedural safeguards which might provide a "fully effective means . . . to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it." *Miranda*, 384 U.S. at 444, 86 S. Ct. at 1602; *see also Illinois v. Perkins*, 496 U.S. 292, 296, 110 S. Ct. 2394, 110 L. Ed. 2d 243 (1990) (describing *Miranda*'s requirements as resting on "the Fifth Amendment privilege against self incrimination"). Because the lines between voluntary confession and impermissible coercion often blur during custodial interrogation, the Court found it essential that the traditional totality-of-the-circumstances test for voluntariness be expanded, and thus the *Miranda* Court crafted a "prophylactic" rule in order to insulate and fully protect the rights of the accused. *Cf. Withrow v. Williams*, 507 U.S. 680, 691, 113 S. Ct. 1745, 123 L. Ed. 2d 407 (1993) (commenting that "[p]rophylactic though it may be, in protecting a defendant's . . . privilege against self-incrimination, *Miranda* safeguards a 'fundamental trial right' "). As pointed out in *Dickerson*, "the [*Miranda*] Court noted that reliance on the traditional totality-of-the-circumstances test raised a risk of overlooking [a coerced] custodial confession, . . . a risk that the Court found unacceptably great when the confession is offered in the case in chief to prove guilt." *Dickerson*, 530 U.S. at ___, 120 S. Ct. at 2335.

The rule embraced by the majority, which, when implemented would suppress the physical fruits of a *Miranda* violation only when the statements leading to

the discovery of the evidence were coerced, is inappropriate for the very reasons that the *Miranda* requirements were established. The majority's rule assumes that a totality-of-the-circumstances test is sufficient for determining whether statements leading to the discovery of physical evidence, made during a custodial interrogation, were voluntarily made. As recognized in *Miranda*, however, the totality-of-the-circumstances analysis fails to fully protect the accused from violation of the Fifth Amendment privilege precisely because it is exceedingly difficult to discern where a statement divulged during a custodial interrogation lies on the already blurred line between voluntariness and coercion. 384 U.S. at 455, 86 S. Ct. at 1617-18. If it were practicable for reviewing courts to determine through a simple totality-of-the-circumstances analysis whether statements made during custodial interrogation were coerced, there would be no need for *Miranda*. Under the majority's analysis, the risk that physical evidence will be admitted erroneously when, in actuality, that evidence has been obtained through unconstitutional coercion, is too great.

The requirements of *Miranda* acknowledge that the right against compelled self-incrimination must be broadly insulated if the rights of the accused are to be adequately protected. If this goal is to be accomplished, *Miranda*'s exclusionary rule must be applied in a manner which ensures that police are deterred from violating the accused's Fifth Amendment rights. *Cf. Collazo v. Estelle*, 940 F.2d 411 (9th Cir.1991) (noting that the due process exclusionary rule for confessions is intended, at least in part, to deter improper police conduct). Clearly, then, the goals of *Miranda* are advanced if police are prevented

from using physical evidence they obtain from a *Miranda* violation, for this should deter them from violating the rules therein established.

That police will not be deterred from violating a suspect's *Miranda* rights if physical fruits of those violations are allowed in evidence is not idle speculation. Recently, scholars have documented the development of the relatively new police practice of "questioning outside *Miranda*." *See* Joshua Dressler and George C. Thomas III, *Criminal Procedure: Principles, Policies, and Perspectives* at 605 (1999); Charles D. Weisselberg, *Saving Miranda*, 84 Cornell L.Rev. 109 (1998). According to these commentators, police subscribing to this practice deliberately interrogate suspects without informing them of their *Miranda* rights, sometimes even telling them that the statements they make "outside *Miranda*" cannot be used against them. *See* Dressler and Thomas, *supra*, at 605, Weisselberg, *supra*, at 160. One California police training video goes so far as to instruct police officers that "[w]hen you violate *Miranda*, you're not violating the Constitution. *Miranda* is not the Constitution. It's a court-created decision that affects the admissibility of testimonial evidence and that's all it is. So you don't violate any law. You don't violate the Constitution." Weisselberg, *supra*, at 110 (quoting Training Videotape, *Questioning: "Outside Miranda"* (Greg Gulen Productions 1990)). While no one knows how prevalent the practice of questioning "outside *Miranda*" may be, there is no doubt that inherent in such questioning lies an increased risk that violence will be done to the constitutional rights of the accused. As stated by Weisselberg:

> [T]he new vision transforms *Miranda* from a decision that protects a suspect into a new and aggressive tool for law enforcement. Under this practice, officers comply with the warning requirements of *Miranda*, but then represent that the suspect's assertion of rights makes a full statement perfectly safe. Of course, given the current use of the statements to impeach and to discover other evidence, the officers' assurances at best mislead the suspect and at worst directly deceive him or her regarding the true state of the law.

Weisselberg, *supra*, at 161-62. It is difficult to deny that allowing the physical fruits of a *Miranda* violation to be used as evidence greatly encourages this questionable practice. Such a result should be unacceptable, particularly given this Court's claims that the Tennessee Constitution affords this State's citizens even greater protection of individual liberties than is guaranteed by the federal Constitution.

For the foregoing reasons, I would hold that physical evidence which is discovered as a direct result of a *Miranda* violation should be suppressed. The majority's decision to allow such evidence fails to further the objectives upon which the *Miranda* decision was based, and it fails to deter police violations of the accused's *Miranda* rights. Accordingly, I dissent.

/s/ Adolpho A. Birch, Jr., Justice
ADOLPHO A. BIRCH, JR., JUSTICE

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON
November 16, 2000 Session

STATE OF TENNESSEE v. TIMOTHY WALTON

Circuit Court for Dyer County
No. C97-205

No. **W1998-00329-SC-R11-CD**

JUDGMENT

(Filed March 15, 2001)

This case was heard upon the record on appeal from the Court of Criminal Appeals, application for permission to appeal having heretofore been granted, briefs and argument of counsel; and upon consideration thereof, this Court is of the opinion that the appellee was subjected to custodial interrogation in violation of the requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966). This Court is also of the opinion that while any statements made by the appellee in response to such interrogation are automatically suppressed, the physical evidence recovered as fruit of that violation is admissible because the statements were not the product of physical or psychological coercion.

In accordance with the opinion filed herein, it is, therefore, ordered and adjudged that the judgment of the Court of Criminal Appeals is Affirmed in Part and Reversed in Part. This case is remanded to the Circuit Court for Dyer County to give the appellee the opportunity to withdraw his plea should he so desire. Should

the appellee decide not to withdraw his previous plea, the Circuit Court shall enter judgment accordingly.

Costs of this appeal shall be divided equally among the appellant, the State of Tennessee, and the appellee, Timothy Walton.

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Trial Court: Dyer County Circuit Court
Trial Court Number: C97-205

The Appellate Court Clerk's office has entered the above action in the Justice Information Tracking System.

COMMENT:

Costs of this appeal shall be divided equally among the appellant, the State of Tennessee, and the appellee, Timothy Walton.

SLC
C: Mark E. Davidson